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No. 04-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF OF THE RESPONDENTS

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QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment forbid an economically distressed city from employing its eminent domain power to condemn, and pay just compensation for, private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, and to realize immediate structural and environmental benefits for the city and its residents?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners, who were the plaintiffs below, are: Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Wilhelmina and Charles Dery, James and Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle.

The respondents, who were the defendants below are: the City of New London, Connecticut, and the New London Development Corporation.

RULE 29.6 DISCLOSURE STATEMENT

The New London Development Corporation is a non-stock, non-profit development corporation designated by the City of New London, pursuant to Conn. Gen. Stat. §8-188, as the official development agency for the Fort Trumbull Municipal Development Project.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS BELOW	ii
RULE 29.6 DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	11
ARGUMENT	13
CONCLUSION	50

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City, 488 U.S. 336 (1989) 20

Aposporos v. Urban Redevelopment Commission, 790 A.2d 1167 (Conn. 2002) 37, 38

AvalonBay Communities, Inc. v. Town of Orange, 775 A.2d 284 (Conn. 2001) 38

Berman v. Parker, 348 U.S. 26 (1954) ..... *passim*

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 19, 20, 28

Charlotte, C. & A. R. Co. v. Gibbes, 142 U.S. 386 (1892) 32

Cincinnati v. Vester, 281 U.S. 439 (1930) 40, 41

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 40

Clark v. Nash, 198 U.S. 361 (1905) 19

Crawford v. Washington, 541 U.S. 36 (2004) 16

County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) 33, 37

Dolan v. City of Tigard, 512 U.S. 374 (1994) 39, 40

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 12, 18

Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) 34

Ferguson v. Skrupa, 372 U.S. 726 (1963) 50

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 18, 40

TABLE OF AUTHORITIES – Continued

Page

Food & Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 21

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 20

General Motors v. Tracy, 519 U.S. 278 (1997) 12, 20

Georgia Dept. of Transportation v. Jasper County, 586 S.E.2d 853 (S.C. 2003) 37

Hairston v. Dansville & Western Railroad Co., 208 U.S. 598 (1908) 32

Harding v. Funk, 8 Kan. 315, 1871 WL 785 (1871) 31

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ..... *passim*

Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) 31

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 13, 14

Lochner v. New York, 198 U.S. 45 (1905) 12, 19

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 29

Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) 23

Miller v. Troost, 14 Minn. 365, 1869 WL 2322 (1869) 31

National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) ..... *passim*

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 39

New State Ice Co. v. Liebman, 285 U.S. 262 (1932) 20, 21

New York v. United States, 505 U.S. 144 (1992) 22

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 17, 18, 39, 40

TABLE OF AUTHORITIES – Continued

Page

Olmstead v. Camp, 33 Conn. 532 (1866) 31

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 18

Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002) 38

Printz v. United States, 521 U.S. 898 (1997) 21

Rindge Co. v. Los Angeles, 262 U.S. 700 (1923) 25, 47

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 28

Schweiker v. Wilson, 450 U.S. 221 (1981) 14

Scudder v. Trenton Delaware Falls Co., 1832 WL 2274 (N.J. Ch. 1832) 31

State v. Travelers Ins. Co., 47 A. 299 (Conn. 1900) 20

Southwest Illinois Development Authority v. National City Environmental, 768 N.E.2d 1 (Ill. 2002) 37

United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896) 15, 19, 40

United States ex rel. TVA v. Welch, 327 U.S. 546 (1946) 19

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 42

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 19

Wilson v. Pittsburgh & L.E. Railroad Co., 72 A. 235 (Pa. 1909) 32

STATUTES

Conn. Gen. Stat. §4-66b 4, 34

Conn. Gen. Stat. §8-129 36

TABLE OF AUTHORITIES – Continued

Page

Conn. Gen. Stat. §8-130 36
Conn. Gen. Stat. §8-186 ..... 9, 11, 23, 24, 34
Conn. Gen. Stat. §8-188 ..... iii, 1, 45
Conn. Gen. Stat. §8-189 ..... 5, 6, 43
Conn. Gen. Stat. §8-190 43
Conn. Gen. Stat. §8-191 ..... 6, 43
Conn. Gen. Stat. §8-193 ..... 1, 36, 43
Conn. Gen. Stat. §8-200 ..... 9, 43
Conn. Gen. Stat. §8-266, et seq. 8
Conn. Gen. Stat. §22a-1, et seq. 5
Conn. Gen. Stat. §32-9p 2
10 U.S.C. §2687 2
42 U.S.C. §1983 21

OTHER AUTHORITIES

4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES (Charlene B. Bickford & Helen E. Veit eds., 1986) 17

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT OF THE CASE

A. The Facts of the Case

The respondent City of New London occupies 5.79 square miles at the junction of the Thames River and Long Island Sound in southeastern Connecticut. (Joint Appendix, ("J.A.") 91, 93). New London, which is geographically the second smallest of the 169 municipalities in Connecticut, was once a center of the whaling industry and later a manufacturing hub. (J.A. 91, 93, 303). However, New London has suffered through decades of economic decline. (Appendix to Petition for Certiorari, ("Pet. App.") 196, 272-73). Staggering economic woes – which include an unemployment rate close to double that of the rest of the state, a shrinking population, a dearth of new home and business construction and the departure of one of the region's principal employers – caused the State of Connecticut Office of Planning and Management (OPM) to designate New London a "distressed municipality". (J.A. 239, 253, 298, 303-04; Pet. App. 70-71, 272-73). In addition, local property taxes are the main source of municipal funding in Connecticut, but 54 percent of New London's land is tax-exempt. (J.A. 91).

Faced with this untenable economic situation, the respondent New London Development Corporation (NLDC) planned a development project for the city's Fort Trumbull section, which is located on a peninsula that juts out into the Thames River. (J.A. 4, 36, 212). The NLDC is a statutory, non-stock, non-profit development corporation with a volunteer board and no independent power of eminent domain. Under Connecticut law, a city may designate such a corporation to act as its development agent for an economic development project. See Conn. Gen. Stat. §8-188. A city may then authorize the development corporation to acquire real property through eminent domain in the project area in the city's name. See Conn. Gen. Stat. §8-193. Pursuant to this statutory authority, the New London City Council designated the NLDC as its development agent for the Fort Trumbull Municipal Development Plan (MDP), and authorized the use of eminent domain on New London's

behalf. (J.A. 26-29). The MDP was designed, in the words of the trial court, to "provide an economic and social uplift for [the] city. . . . " (Pet. App. 197). Maps of the MDP area are at pages 3-4 and 212 of the Joint Appendix.

The *undisputed* facts regarding the steady deterioration of New London's economy from the 1970's onwards demonstrate the dire need for such a project. These facts include:

- The 1990 designation of New London as a "distressed municipality" by OPM, pursuant to Conn. Gen. Stat. §32-9p. (Pet. App. 272).
- The steady decline of New London's population from a high of 34,182 in 1960 to 23,860 in 1998, its lowest since 1930. (J.A. 298; Pet. App. 272).
- An unemployment rate, 7.6 percent, almost twice as high as the overall figure for the state and three percent higher than the neighboring town of Groton. (J.A. 239; Pet. App. 272).
- The 1996 closure of the Naval Undersea Warfare Center (NUWC), located on the Fort Trumbull peninsula, which employed as many as 1500 people in the late 1980's.[1] (J.A. 253).
- A sluggish labor market that has been outperformed by a wide margin by both the state as a whole and the surrounding region. (Pet. App. 272).
- Sixty-one percent of the city's housing was built before 1950, with a high percentage of vacant housing. (Pet. App. 273).

In addition to these city-wide problems, the Fort Trumbull area itself suffers from numerous ills:

[1] As a part of the MDP, New London acquired the 32 acres formerly occupied by NUWC from the federal government via an economic development conveyance pursuant to the Base Closure and Realignment Act, 10 U.S.C. §2687. Eighteen of those acres are now Fort Trumbull State Park. (Pet. App. 4-5).

- An 82 percent vacancy rate for non-residential buildings and a 20 percent rate for non-commercial property. (J.A. 191; Pet. App. 273).
- Very low tax revenue for the MDP area ($325,000). (J.A. 191; Pet. App. 273).
- 55 percent of the buildings in the MDP area were built prior to 1950. (J.A. 322).
- Sixty-six percent of the non-residential buildings are in fair to poor condition and less than twelve percent of the residential buildings are in average or better condition. (J.A. 323; Pet. App. 273).
- Since 1990, existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect. (Pet. App. 273).

It is little wonder, then, that the trial court found New London to be a "city buffeted for decades by hard times and until recently declining prospects." (Pet. App. 196).

The record is clear that New London was a city desperate for economic rejuvenation. The NLDC, which originally was established in 1978, was re-formed in 1997 following the closure of NUWC to assist the city in planning that economic rebirth at the site of the closed base. (J.A. 264; Pet. App. 3). In January 1998, the first step in that rebirth occurred when Connecticut's State Bond Commission authorized $5.35 million in bonds to support planning activities and limited property acquisition and a further $10 million in bonds towards the creation of Fort Trumbull State Park. (J.A. 4, 264). The following month Pfizer, Inc., a world leader in pharmaceutical development, announced its plan to build a global research facility in New London, on a site adjacent to the Fort Trumbull peninsula. (J.A. 264; Pet. App. 4). Construction of the $300 million Pfizer facility began in April 1999. By the time the petitioners' properties were condemned in November 2000, the facility was almost completed. Pfizer staff began moving in early in 2001. (Trial Tr., 8/13/01, 69-70).

In April 1998, the New London City Council gave its initial approval for the NLDC to prepare an economic development plan for a 90-acre section of Fort Trumbull. (J.A. 264-65; Pet. App. 4). Fort Trumbull was selected as the best site for a planned development because of the availability of the NUWC site and because the majority of Fort Trumbull is a "regional center"[2], for which the Connecticut legislature has set the following goal:

> Revitalization of the economic base of urban areas by rebuilding older commercial and industrial areas, and encouraging new industries to locate in the central cities in order to protect existing jobs and create new job opportunities needed to provide meaningful economic opportunity for inner city residents. . . .

Conn. Gen. Stat. §4-66b. This goal has special applicability here, as most of the 90 acres – including the areas in which the petitioners own properties – have been zoned for commercial and light industrial use since 1928.[3] (J.A. 113-16, 288-91).

Upon initial approval by the city council, the NLDC began a series of neighborhood meetings to educate the residents about the development process. (J.A. 264; Pet. App. 4). The NLDC utilized a combination of notice techniques to encourage resident attendance and participation at these meetings – e.g., newspaper advertisements, direct mail, and public announcements at city council meetings. In addition, the meetings received extensive newspaper coverage. (J.A. 654-55). The NLDC held six such meetings between April and October 1998, with speakers from the NLDC, the City of New London and the State of Connecticut Department of Economic and Community Development (DECD). (J.A. 655).

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[2] Pursuant to state planning guidelines, regional centers "encompass land areas containing traditional core area commercial, industrial, transportation, specialized institutional services, and facilities of intertown significance." (J.A. 276).

[3] All of the residential properties in Fort Trumbull – including those owned by the petitioners – were built before 1940, and most predate zoning in New London. (J.A. 322; Def. City Exh. 6).

In May 1998, the city formally authorized the NLDC to begin the development process. (J.A. 89; Pet. App. 4). In June 1998, DECD found that the Fort Trumbull project could have a significant environmental impact. (J.A. 90, 265). Under Connecticut law, see Conn. Gen. Stat. §22a-1, et seq., this finding mandated a full-scale Environmental Impact Evaluation. The Evaluation involved extensive investigation of the effect of any development at Fort Trumbull on the water supply, traffic patterns, noise and air pollution levels, historically important buildings, flood prevention, and a host of other concerns.[4] (J.A. 90, 239-41). The Evaluation also included the neighborhood meetings, the solicitation of comments from members of the community, and review of proposed findings by the community. (J.A. 90, 239-41).

In addition, Conn. Gen. Stat. §8-189 requires a finding that any economic development plan be

> in accordance with the plan of development for the municipality adopted by its planning commission and the plan of development of the regional planning agency, if any, for the region within which the municipality is located [and] that the plan is not inimical to any state-wide planning program objectives of the state or state agencies as coordinated by the Secretary of the Office of Policy and Management. . . .

§8-189. In accordance with this directive, the Evaluation carefully considered a number of state and regional planning documents detailing the already-existing policies for economic development in the region and the state. (J.A. 272-73).[5]

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[4] The entire Environmental Impact Evaluation is at pages 213-735 of the J.A. (Volumes II & III).

[5] Section 8-189 contains a number of other requirements for economic development projects relevant to the question of public use. See Section II of the Respondents' Brief, *infra*.

The Evaluation, started in June 1998, was completed in November 1998. (J.A. 213, 241). After a mandatory 45-day public comment period, the Evaluation was formally approved and forwarded to OPM. (J.A. 90-91). In April 1999, OPM made the findings required by §8-189 and determined that the Fort Trumbull project met all relevant regulatory requirements. (J.A. 91). As required by Connecticut law; see Conn. Gen. Stat. §8-191; DECD, the Connecticut Department of Environmental Protection and the Southeastern Connecticut Council of Governments also approved the development plan. (Pet. App. 8 n.8).

The NLDC then began formulating the specifics of the MDP. As part of that process, the NLDC considered six possible plans of action for the Fort Trumbull area previously set out in the EIE.[6] (Pet. App. 7). The draft plan, (J.A. 83-212), completed in August 1999 and thereafter adopted by the NLDC, is a composite of the positive elements of alternatives 2, 4, 5, and 6. The plan carefully balances the many environmental and developmental concerns expressed during the Evaluation process and contains the fewest negative impacts for Fort Trumbull. (J.A. 195-97).

The plan divides the 90 acres into seven parcels:

- Parcel 1: A waterfront hotel and conference center, marinas for tourist boats and commercial vessels, and the Riverwalk (a public walkway along the waterfront).
- Parcel 2: Eighty new residential properties organized in a planned urban-style neighborhood

[6] The alternate plans considered and rejected by the NLDC were: "(1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements." (Pet. App. 7 n.6). These alternatives are described in more detail at pages 193-95 of the J.A., and in a chart on page 248 of the J.A.

and linked by a public walkway to the rest of the plan area; this parcel also includes space reserved for the new site of the United States Coast Guard Museum.

- Parcel 3: 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.
- Parcel 4: Divided into two subparcels – 4A, which will provide park support and marina support, including parking and retail services; and 4B, which will include a renovated marina for both recreational and commercial boating. In addition, the Riverwalk will continue through Parcel 4B.
- Parcel 5: 140,000 square feet of office space, parking and retail space.
- Parcel 6: Development of water-dependent commercial uses.
- Parcel 7: Additional office space and/or research and development space.

(J.A. 109-113; Pet. App. 5-6). Although divided into parcels for ease of administration, the MDP does not consist of seven independent development plans. Rather, it is one plan to be considered as an integrated whole. (J.A. 139-40).

The petitioners own fifteen properties located in the middle of the Fort Trumbull peninsula. (J.A. 3, 4). Four properties owned by three of the petitioners are located in Parcel 3. Eleven properties owned by the remaining petitioners are located in Parcel 4A and comprise 0.76 acres. (Pet. App. 6, 125). The properties owned by petitioners Kelo, Brelesky, Cristofaro and Dery are either owner-occupied or occupied by a family member. However, the lots owned by petitioners Pataya Construction Ltd. Partnership and Von Winkle, which constitute almost half the total, are investment or commercial properties for which the petitioners are absentee landlords. (J.A. 10-11, 702-703; Trial Tr., 7/23/01, 97, 111).

The potential economic benefits of this plan as a whole to the people of New London are enormous. The record below demonstrates that the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in [annual] property tax revenues for the city. . . .

(Pet. App. 7; J.A. 203). As found by the trial court, this influx of jobs and revenue will be critical in continuing the economic revitalization of the city. (Pet. App. 196, 282, 327).

In addition to the jobs and tax revenues, the MDP will have a number of immediate benefits for the people of New London. Areas within the 100-year floodplain will be filled to be made suitable for development. (Pet. App. 356 n.20). There will be extensive improvements to the streets, sewers and utilities in the MDP area, as well as much-needed environmental remediation.[7] (J.A. 143-47, 159-60, 180-81, 442-43, 718-21). The Riverwalk will provide public access to, and use of, the waterfront, which was previously unavailable due to the presence of the NUWC facility. (J.A. 140-41). Nor are the needs of those residents displaced by the MDP ignored. To the contrary, the MDP complies with the Uniform Relocation Assistance Act; Conn. Gen. Stat. §8-266, et seq.; and earmarks *over $10 million* in relocation assistance funds for displaced home and business owners, over and above the amounts for just compensation. (J.A. 206-207).

[7] The MDP earmarks $20 million in public funds for the creation of the Fort Trumbull State Park on the former NUWC site; $7 million to upgrade the regional sewage treatment facility located in Fort Trumbull; $9 million for environmental remediation; and $24 million for plan preparation, property acquisition and infrastructure development, $2 million of which came from the United States Commerce Department in the form of a Financial Assistance Award. (J.A. 258; Trial Tr., 7/24/01, 109; see also J.A. 186).

On January 18, 2000, the NLDC board adopted the development plan. (J.A. 12). On the same day, the New London City Council approved it and authorized the NLDC to acquire the properties located in the plan area, by eminent domain if necessary, in the name of the City of New London. (J.A. 26). Thereafter, DECD also approved the plan. (J.A. 12). The 90 acres contained approximately 115 parcels, (J.A. 91), the vast majority of which the NLDC acquired voluntarily. (Trial Tr., 7/25/01, 224-25).

In October 2000, after months of unsuccessful negotiations with the petitioners, the NLDC voted to acquire their properties by eminent domain. In November 2000, the NLDC, acting as the statutorily-designated development agent for the city, brought condemnation actions for the petitioners' properties pursuant to Chapter 132 of the Connecticut General Statutes (Conn. Gen. Stat. §§8-186 to 8-200b). (Pet. App. 8). The statements of compensation describe the city, acting by the NLDC, as the official condemnor. (J.A. 6). In keeping with those statements of compensation, and pursuant to Connecticut law, over $1.6 million has been placed in escrow with the clerk of the Connecticut trial court as compensation for the petitioners' properties. The NLDC will own all 90 acres in the project area and will lease portions of that property to private developers. (Pet. App. 6).

B. The State Court Proceedings

The respondents agree with the petitioners' statement of the proceedings in the trial court.[8] After the trial court's decision, the petitioners appealed and the respondents cross

[8] The trial court put the issue most eloquently: "On the other side of this controversy [from the petitioners] are what may be considered abstract entities – the City of New London, the New London Redevelopment Agency. *But the people behind these abstractions have a dream also . . . Their dream is for their city buffeted for decades by hard times and until recently declining prospects.*" (Pet. App. 196) (emphasis added).

appealed the trial court's decision. (Pet. App. 2). The Connecticut Supreme Court held that

> the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

(Pet. App. 2). The majority upheld the trial court's ruling with respect to Parcel 3. The majority further held that the trial court's findings with respect to the necessity of the takings on Parcel 4A were clearly erroneous and remanded the case to the trial court with direction to render judgment for the defendants with respect to the eleven properties located in Parcel 4A. (Pet. App. 133).

The majority based its decision on *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and employed a "broad purposive approach to the interpretation of the federal public use clause." (Pet. App. 39). This approach, in keeping with *Berman* and *Midkiff*, emphasizes "the legislative purpose and motive behind the taking, and give[s] substantial deference to the legislative determination of purpose." (Pet. App. 42).

Three justices concurred in part and dissented in part in one opinion. The three dissenters "agree[d] with the conclusion of the majority" that "private economic development projects ... which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions." (Pet. App. 171). With respect to this specific case, the dissent also agreed with the majority that

> [t]he record *clearly demonstrates* that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue,

> encouraging spin-off economic activities and maximizing public access to the waterfront. Furthermore, the proposed project is being undertaken in an economically 'distressed' municipality in need of a stimulus to invigorate the local economy.

(Pet. App. 176) (emphasis added); (Pet. App. 70-71) (majority opinion).

The dissent took issue only with the analytical process employed by the majority, which it viewed as too deferential. In place of the majority's "purposive" test, the dissent called for a heightened degree of judicial scrutiny to ensure that a taking for economic development will, in fact, result in a public benefit. (Pet. App. 134-90).

SUMMARY OF ARGUMENT

At the heart of this case are a series of decisions made by the Connecticut legislature and the elected officials of the City of New London as to what will best serve the economic, social, structural and environmental interests of New London's citizens. In the exercise of its traditional police power, the Connecticut legislature has declared that economic development, and the acquisition of private property to further such development "are public uses and purposes for which public moneys may be expended. . . . " Conn. Gen. Stat. §8-186. In accordance with this statutory directive and after a painstaking deliberative process, the respondents determined that the economic revitalization of New London, as well as its environmental, social and structural health, would best be served by enacting the MDP – and, as a necessary consequence thereof, taking the petitioners' properties through eminent domain.

This Court has a long history of deference to legislative and municipal wisdom in exercising the power of eminent domain. See *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992); *Midkiff*, *supra*; *Berman*, *supra*. This deference is premised on two well-settled principles: (1) that courts are "unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them[,]"

General Motors v. Tracy, 519 U.S. 278, 308 (1997); and (2) that the primary purpose of the Takings Clause is not to act as a substantive restraint on government behavior, but to assure compensation for any affected property owners should the government choose to exercise its eminent domain power; see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring). In keeping with these principles, only once in its over two hundred years of existence has the Court held a *compensated* physical taking of property to be unconstitutional. Such jurisprudential caution is in keeping with this Court's longstanding policy – aside from the ill-starred era of *Lochner v. New York*, 198 U.S. 45 (1905) – of showing great deference to economic decisions made by legislative and municipal officials.

This Court should adhere to these precedents and affirm the judgment of the Connecticut Supreme Court. This Court first should hold that economic development constitutes a public use within the meaning of the Fifth Amendment. It is undisputed that maintaining the economic health of a city falls within the police powers traditionally reserved to the states, and this Court has held that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. Therefore, employing the power of eminent domain to revitalize a municipality's economy satisfies the public use requirement. This is especially true in urban settings, in which the problem of land assembly often acts as a barrier to economic revitalization.

Such holding is no less valid merely because the economic improvements in question will be achieved by allowing private entities to lease the property taken through eminent domain. The principal focus of the public use equation has always been whether the taking will produce a significant benefit to the public and not the means by which that benefit comes into being. Moreover, such a holding would not only preserve the appropriate balance between the legislative and judicial branches, but it would be in keeping with the division between federal and state authority that is at the core of our federalist system of government.

This Court should then hold that the particular condemnations at issue in the present case satisfy the Public Use Clause. As it has in the past, this Court should eschew a lot-by-lot, building-by-building inquiry into whether each individual piece of property is essential for the project as a whole because such scrutiny interferes with the legislature's role as "the main guardian of the public needs to be served by social legislation. . . . " *Berman*, 348 U.S. at 32. However, even under the intrusive and unwieldy level of scrutiny for compensated takings proposed by the petitioners, the particular condemnations at issue are constitutional because they are reasonably certain to achieve significant public benefits – e.g., the creation of thousands of jobs, significant increases to New London's annual revenues, environmental remediation and improvements to Fort Trumbull's decaying infrastructure. Some of these benefits – environmental remediation and infrastructure improvements – already have taken place. With respect to the economic benefits, the reasonable assurances and enforcement mechanisms that are in place here are sufficient to satisfy the Takings Clause.

ARGUMENT

I. THIS COURT SHOULD ADHERE TO ITS DEFERENTIAL STANDARD OF REVIEW FOR LEGISLATIVE OR MUNICIPAL DETERMINATIONS OF PUBLIC USE AND HOLD THAT ECONOMIC REVITALIZATION CONSTITUTES A PUBLIC USE WITHIN THE MEANING OF THE TAKINGS CLAUSE.

In his dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), Chief Justice Rehnquist summed up the guiding principle of this Court's Takings Clause jurisprudence:

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may

> not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'"

Id. at 511 n.3 (quoting *Midkiff*, 467 U.S. at 242) (emphasis and ellipses in original).

This settled wisdom, agreed with by the majority in *Keystone* – that an exercise of eminent domain authority passes constitutional muster so long as the legislative or municipal authority *"rationally could have believed"* in its potential effectiveness – has long guided this Court's consideration of Takings Clause cases. It is wisdom born out of this Court's recognition of the necessary primacy of legislative judgment in the realm of public welfare and the Court's self-admitted inadequacy at making predictive judgments about society's economic or social future. It is wisdom that acknowledges that the proper role of unelected, federal judges in a democracy is to act with restraint when reviewing economic or social policy choices made by a state's elected representatives. And, in spite of the frenzied heat of the petitioners' arguments, it is wisdom that remains as valid in the twenty-first century as it was in the nineteenth and twentieth, and as valid for economic revitalization as it was for the myriad of other public purposes upheld by this Court.

A. The deferential standard employed by this Court since *Berman v. Parker* remains the appropriate standard by which to judge legislative or municipal claims of public use.

It long has been recognized by this Court that the primary responsibility for addressing society's economic and social ills belongs to the legislative branch. As this Court noted in *Schweiker v. Wilson*, 450 U.S. 221 (1981), the legislature is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Id.* at 230.

Such an approach is no less warranted simply because the democratic choice in question involves the legislative or municipal decision to spend public money in order to acquire property through eminent domain. In either case, for the judicial branch, deference is the better part of valor. Indeed, a half-century ago this Court spoke clearly as to the limits of judicial authority in takings cases:

> Subject to specific constitutional limitations, when the legislature has spoken, *the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. *The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.*

Berman, 348 U.S. at 32 (emphasis added).

Thirty years later, in *Midkiff*, this Court reiterated and refined the holding of *Berman*. Although the courts have a role to play in reviewing the determination of a public use, that role is "an extremely narrow" one. *Midkiff*, 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Because "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers[,]" *Midkiff*, 467 U.S. at 240, the standard of review for Takings Clause cases is extremely deferential: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. A court should be unwilling to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

Eight years after *Midkiff*, this Court again emphasized its extremely limited role in reviewing questions of public use. In *National Railroad Passenger Corp.*, *supra*, which, involved re-transfer of ownership of the condemned property

to another private entity, this Court repeated its earlier holding that "the public use requirement of the Takings Clause is coterminous with the regulatory power, and that [we] will not strike down a condemnation on the basis that it lacks a public use so long as the taking is 'rationally related to a conceivable public purpose.'" *National Railroad*, 503 U.S. at 422 (quoting *Midkiff*, 467 U.S. at 240-41).

One of the primary lessons of *Berman*, *Midkiff* and *National Railroad* is that the need for such deference does not depend on the nature of the public use at issue. After all, deference was the guiding principle in *Berman*, *Midkiff* and *National Railroad* even though those three cases concerned three widely divergent government endeavors: the elimination of blighted slums[9] (*Berman*); the dissolution of an oligarchic property ownership structure (*Midkiff*); and the facilitation of interstate rail service (*National Railroad*). What matters about those three cases is their recognition that unelected judges are ill-suited to the task of determining what is an appropriate public use.

The historical, legal and logical bases for *Berman*, *Midkiff* and *National Railroad* remain unaltered in this case. A review of those principles makes it clear that economic revitalization constitutes a public use pursuant to the Takings Clause.

1. The text and history of the Takings Clause demonstrates that its principal focus is to provide compensation and not to act as a substantive restraint on government behavior.

The text of a constitutional provision is the starting point for its construction. See *Crawford v. Washington*, 541 U.S. 36, ___, 124 S. Ct. 1354, 1359 (2004). In this case, that

[9] As the trial court observed, "[t]he bleak economic conditions that earned [New London's designation as a distressed municipality] are conditions just as worthy of attention and dangerous to the economic and moral health of the state as slum or blighted areas. . . . " (Pet. App. 255 n.10).

text – "nor shall private property be taken for public use without just compensation" – contains a clear syntactic signal that its primary purpose is not to regulate legislative determinations of public use. That signal is the placement of the word "without," which announces the emphasized prepositional phrase in the Clause, i.e., "without just compensation". In contrast, "public use" appears in the Clause without any exclusionary word to complement "nor". Indeed, in its phrasing the Clause almost assumes that any private property taken by eminent domain would *ipso facto* be for a public use, otherwise one would expect "for public use" to be preceded by "except," or some other exclusionary preposition. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 589-90 & 590 n.10 (2nd Ed. 1988) (compensation is surrogate assurance of public use).

This construction is borne out by the history of the Clause. In an earlier draft of the Fifth Amendment, James Madison proposed that the Clause should read, "[n]o person shall be . . . obliged to relinquish his property, *where it may be necessary for public use*, without just compensation." 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: LEGISLATIVE HISTORIES 10 (Charlene B. Bickford & Helen E. Veit eds., 1986) (emphasis added). Madison's draft – which was amended without comment by the House to its present form – arguably places more emphasis on the public use question. See Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002). Madison's draft seems to call for an inquiry akin to that proposed by the petitioners; i.e., whether a particular taking is, in fact, "necessary" for public use. However, our founding fathers chose, by their alteration of Madison's proposal, not to endorse such an intrusion into what was thought to be a legislative area (although they did reject purely private takings). See *id.* at 1248.

The notion that the Takings Clause was not primarily meant to act as a restraint on government action in the realm of *compensated* takings is a familiar one to the Court. Indeed, Justice Scalia's majority opinion in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), concludes with this telling comment:

> The Commission may well be right that [beach access] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its comprehensive program, if it wishes, by using its power of eminent domain for this public purpose . . . but if it wants an easement across the Nollans' property, *it must pay for it*.

Id. at 841-42 (emphasis added; internal citation and quotation marks omitted); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[t]he rights of the public in a street purchased . . . by eminent domain are those that it has paid for").

Finally, in *Eastern Enterprises v. Apfel*, *supra*, Justice Kennedy wrote that the Takings Clause "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises*, 524 U.S. at 545 (Kennedy, J., concurring). His concurrence, quoting this Court's earlier decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987), pointed out that the language of the Takings Clause "makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Eastern Enterprises*, 524 U.S. at 545. Justice Breyer, writing for himself and the three other dissenting Justices, agreed with Justice Kennedy – and numerous earlier decisions of this Court – that "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554 (Breyer, J., dissenting) (emphasis in original). The plurality opinion in *Eastern Enterprises* did not quarrel with these observations by Justices Kennedy and Breyer. *Eastern Enterprises*, 524 U.S. at 522-23.

2. The courts are ill suited to determining whether a taking is for a legitimate public use.

In our constitutional system, the judiciary appropriately has a very limited role in reviewing the wisdom of economic decisions made by the legislature. See *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946) ("[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision"). Since the demise of the *Lochner* era, this Court no longer strikes down economic choices made by the legislature "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

It would be a mistake similar in scope to the improvident jurisprudence of *Lochner* and its progeny for this Court once again to substitute its judgment as to the wisdom of an economic choice made by legislative and municipal officials. It would be ironic if the economic choice to declare a public use and spend the public's money for that use were subjected to stricter judicial review under the Takings Clause than the economic choice to regulate an employer's relationship with its employees under the Due Process Clause, given that even the *Lochner* era saw great deference to legislative determinations of public use; see *Gettysburg*, 160 U.S. at 680; *Clark v. Nash*, 198 U.S. 361 (1905); no doubt because legislation with compensation is more palatable than legislation without.

As this Court recently noted in support of the decision to uphold Washington's IOLTA program against a Takings Clause challenge, "[i]f the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, *there would be no question as to the legitimacy of the use of the public's money*." *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232 (2003) (emphasis added). But while

due process and equal protections challenges to economic legislation receive the tender mercies of rational basis review, the petitioners would have this Court eviscerate the power of a state or municipality to use eminent domain in order to achieve precisely the same end – economic health – by barring the use of eminent domain for economic revitalization.[10]

This Court should not sanction such an illogical dichotomy. The very same institutional concerns that historically have motivated judicial deference to economic regulation apply with equal force to economic action through eminent domain. First, reviewing courts simply are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." *General Motors*, 519 U.S. at 308. As a result, this Court "customarily ... declin[es] to engage in elaborate analysis of real-world economic effects. ... " *Id.* at 309. Answering such questions, fraught as they are with the "complexities of factual economic proof," is a task with which courts generally have little familiarity and even less expertise. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 342 (1996). The answers are better left to state and municipal governments, which have the freedom and expert ability to conduct "novel social and economic experiments." *New State*

[10] The dissent in *Brown* raises the question whether an analogy to taxation would reduce the public use requirement to a "negligible impediment" because taxation is not subject to that requirement. *Brown*, 538 U.S. at 242 n.2 (Scalia, J., dissenting). But taxation, in most states, is subject to the well-recognized bounds of the police power. A classic case is from Connecticut, *State v. Travelers Ins. Co.*, 47 A. 299, 302-03 (Conn. 1900). This traditional police power informs the limits of the public use requirement. *Berman*, 348 U.S. at 31-32. To say that courts must give great deference to legislative findings of public use is not to say that public use is a negligible impediment. No one suggests, for example, that rational basis review under the Fourteenth Amendment is a negligible impediment. See, e.g., *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City*, 488 U.S. 336 (1989) (applying rational basis review and overturning West Virginia property tax ruling on Equal Protection grounds).

Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The second institutional concern arises out of the insularity of courts from the democratic process. When state and municipal officials make economic or social policy decisions, the people whom those officials represent have the opportunity to voice their opinions on those decisions at the next election. So if the choice is disagreeable to enough people, the consequences of that disagreement will become evident through the political process. See *Printz v. United States*, 521 U.S. 898, 957 n.18 (1997) (Stevens, J., dissenting) ("to the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies"). The same cannot be said for economic choices made by unelected judges, for whom the will of the people does not act as a brake on their power. It is for this reason that, in a democracy, judicial deference to economic decisions is the appropriate course. See *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones").

Finally, federal court deference to the economic and other policy decisions of state legislatures and municipalities helps retain the appropriate balance between state and federal power that is a hallmark of our federalist system. Abandoning such deference in the name of the Takings Clause by requiring the courts to engage in close scrutiny of proposed takings would result in the undue concentration of power in federal hands at the expense of the states. See Brief of the National League of Cities, et al., as *Amici Curiae* ("NLC Brief"), at 12-17; Brief of the Connecticut Conference of Municipalities, et al., as *Amici Curiae* ("CCM Brief"), at 3-4 & n.2-3. The federal courts – perhaps through the medium of actions under 42 U.S.C. §1983 (which was asserted here, although the petitioners chose to file in state court) – would become the *de facto* arbiters in areas such as economic health that traditionally are within the police

powers reserved to the states; areas in which this Court historically has given state and local governments a great deal of leeway to explore policy solutions. This result would threaten not merely state and local authority, but individual liberty as well. See *New York v. United States*, 505 U.S. 144, 181 (1992) ("the Constitution divides authority between federal and state governments for the protection of individuals").

In sum, the reasons behind this Court's traditional deference to legislative or municipal determinations of public use are valid ones which this Court should not abandon. To the contrary, that deference should be the lens through which the Court views the issues and facts of this case.

B. Economic development constitutes a public use as this Court traditionally has understood that term because it is rationally related to a conceivable public purpose.

The appropriate starting point for this Court's inquiry is the clear statement by the Connecticut legislature that economic development, and the acquisition of private property necessary to further such development, is a public use:

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Conn. Gen. Stat. §8-186.

As discussed *supra* in Section IA, this statement of public use is entitled to great deference. *Midkiff*, 467 U.S. at 241. Moreover, it is beyond dispute that the police power – with which the concept of public use is "coterminous" – encompasses the maintenance of a state's economic well-being through the promotion of private business and industry.[11] See *id.* at 239-40. As this Court pointed out 168 years ago, the police power is

> not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem conducive to these ends.

Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837); see also *Berman*, 348 U.S. at 32. Under this expansive definition, promoting the economic health of a state by encouraging the development of business and industry – and thereby ensuring jobs for that state's citizens and tax revenues for its coffers – certainly qualifies as a valid exercise of the police power.

Indeed, the Connecticut Supreme Court was unanimous on this point. (Pet. App., 42, 172). Although the dissent was not convinced that the petitioners' properties

[11] Even the petitioners concede the importance of encouraging such development to the lifeblood of a community. See Pet. Brief at 12 ("businesses, if they are successful, generate tax revenue, employ individuals, and contribute to the overall vitality of a community").

"actually will be developed to achieve a public purpose"; (Pet. App. 170); the dissent agreed that the legislative determination of public use in §8-186 is constitutional, and that "the primary purpose of the takings is to benefit the public." (Pet. App. 176).

The petitioners, on the other hand, dispute the validity of economic development as a public purpose and – in spite of clear findings to the contrary by the trial court and the emphatic rejection of their claim by the Connecticut Supreme Court – continue to insinuate that the primary purpose of such takings generally, and these takings in particular, is to benefit a specific private party, in this case, Pfizer. The petitioners would have the Court lay down a bright-line rule barring the use of eminent domain for economic development simply because the very real public benefits achieved by that development will come to pass, in part, through the activity of private entities. Such a rule has no basis in this Court's jurisprudence or the history of the Takings Clause; nor will a holding that economic development constitutes a public use result in the parade of horribles that the petitioners posit. This Court therefore should reject the petitioners' attempt to circumscribe the power of eminent domain in such a dangerous fashion.

1. This Court consistently has upheld the constitutional validity of using eminent domain to create public benefits through the re-transfer of private property.

On five occasions in the past half-century, this Court has upheld the re-transfer of private property to another private party against Takings Clause challenges because of the public benefits created by the re-transfer. This clear line of precedent – which receives scant attention in the petitioners' brief – should be controlling on the general question of whether economic development is permitted under the Takings Clause.

The seminal case in this Court's modern[12] Takings Clause jurisprudence is *Berman v. Parker*, *supra*. In *Berman*, owners of property condemned pursuant to the District of Columbia Redevelopment Act challenged the Act's constitutionality. *Berman*, 348 U.S. at 28. One of the specific challenges was that the Act authorized the resale of the condemned properties to other private entities; in fact, §7(g) of the Act specifically gave "[p]reference . . . to private enterprise over public agencies in executing the redevelopment plan." *Id.* at 30. The owners argued that "this makes the project a taking from one businessman for the benefit of another businessman." *Id.* at 33.

The Court unanimously rejected this claim. In keeping with the deference to legislative wisdom discussed in Section IA, *supra*, the Court held that "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." *Id.* The Court then recognized that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. *We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.*" *Id.* at 33-34 (emphasis added).

The petitioners attempt to minimize the significance of *Berman* by arguing that the public purpose in that case was the removal of blighted slums, and that "[o]nce that public use was accomplished and the blight removed, transfer of the cleared land to a private party was acceptable." (Pet. Brief at 25). But the petitioners never offer any authority for their novel proposition that re-transfer to a

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[12] Even prior to *Berman*, this Court "long ago rejected any literal requirement that condemned property be put into use for the general public." *Midkiff*, 467 U.S. at 244; see *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923) ("[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use").

private party for economic development – which the D.C. Act specifically envisioned – suddenly becomes constitutionally "acceptable" merely because of an intervening event. Moreover, the petitioners' exclusive focus on blight elimination ignores §6 of the D.C. Act, which, like the Fort Trumbull MDP, mandated the creation of "'a comprehensive or general plan' of the District, including 'a land-use plan' which designates land for use for 'housing, business, industry, recreation, education, public buildings, public reservations, and other . . . public and private uses of the land.'" *Berman*, 348 U.S. at 29. This part of the Act, with its requirement of a plan for Washington's rejuvenation, employs the tool of re-transfer in order to do far more than merely eliminate blight.

This Court reached a similar conclusion in *Hawaii Housing Authority v. Midkiff*, *supra*, in which the Court unanimously upheld the constitutionality of Hawaii's Land Reform Act, which authorized the condemnation of large tracts of leased residential property and the subsequent transfer of ownership of the condemned parcels to their respective lessees, who provided the funds for the just compensation payments. *Id.* at 233. Although it is true that the principal public use in that case was the dismantling of Hawaii's feudal property system, that public use has an ironic analogy in the present case. In *Midkiff*, the *concentration* of the land ownership led to a failure of the market economy necessitating government intervention; here the wide *dispersal* of land ownership (into tenths of an acre) also leads to a failure of the market economy due to the inability to assemble commercially viable parcels for development, as Connecticut's statutory scheme clearly anticipates.

In any event, *Midkiff* is not solely about oligopoly. The Hawaii Act also contains requirements governing the future use of the condemned land – e.g., that a lessee, in order to be eligible, must have "a bona fide intent to live on the lot or be a resident of the State. . . . " *Id.* at 233 n.1. Such a requirement is an expression of public purpose

beyond the mere elimination of an oligarchy. Finally, *Midkiff* reaffirms the broad language of *Berman* about the extremely limited judicial role in determining public use.

This Court issued yet another clear statement regarding the constitutionality of re-transfer to a private party in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, *supra*. In *National Railroad*, the Interstate Commerce Commission – at the behest of the petitioner National Railroad (AMTRAK) – condemned 48.8 miles of railroad track owned by Boston & Maine (BM). *National Railroad*, 503 U.S. at 409-10. Prior to the condemnation, AMTRAK had entered into an agreement with the Central Vermont Railroad (CV), BM's chief competitor, "to at once reconvey the track to CV, and to provide up to $3.1 million to upgrade and rehabilitate the segment." *Id.* at 412.

In spite of this obvious boon to a specific private party (CV), this Court soundly rejected Boston & Maine's claim that the taking was not for a public use because the re-transfer to CV was intended to effect significant *long-term* public benefits (i.e., improving passenger rail service). *Id.* at 422. According to Justice Kennedy's majority[13] opinion:

> In both *Midkiff* and *Berman*, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged. The Court held these exercises of the condemnation power to be constitutional, *as long as the condemning authorities were rational in their positions that some public purpose was served*. . . . That suffices to satisfy the Constitution, *and we need not make a specific factual determination whether the condemnation will accomplish its objectives*.

[13] Justices White, Blackmun and Thomas dissented on an issue unrelated to the public use question. *National Railroad*, 503 U.S. at 424-28.

Id. at 422-23 (emphasis added).[14] See also *Brown*, 538 U.S. at 232 (taking of interest on clients' funds to fund legal services for indigent litigants valid public use); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-16 (1984) (public disclosure of pesticide data pursuant to FIFRA, which made data available to other manufacturers and effected taking, valid public use).

At the end of the day, the petitioners advance no cogent reason for this Court to reverse this long line of decisions upholding the re-transfer of condemned property to a private party, so long as the re-transfer will result in a substantial public benefit. While the *Berman-Midkiff-National Railroad* line of cases is, by itself, reason enough to uphold the validity of a taking for economic development, both the history of takings in our country and considerations of public policy also support such a holding.

2. There is a long history of using the power of eminent domain to achieve a public good through re-transfer of condemned property to a private entity.

This Court's Takings Clause jurisprudence has, for more than a century, taken a "broad" view of public use. Moreover, the narrow reading urged by the petitioners is more wishful thinking than historical fact. The history of eminent domain authority demonstrates that a taking could be for a public use even if a private entity benefited from

[14] The petitioners' assessment of *National Railroad* as merely another common carrier case ignores the crucial distinctions between *National Railroad* and those cases. See *infra*, Section IB(2). In *National Railroad*, unlike this Court's railroad decisions from the late nineteenth and early twentieth centuries, the condemnation was not necessary to allow the construction of a straight line of track because the track had already been built and was in operation. The government was therefore taking a functioning segment of railway track from one operator and giving it to another. What is more, in *National Railroad*, the beneficiary of the government's use of eminent domain was a specific, known private company in competition with the condemnee – a situation not found in earlier railroad cases, *nor in this case*.

the taking or if a private entity was the condemnor. Indeed, the common thread running through this entire history, from colonial times until the present, is that the public often benefits greatly from takings that result in use of the condemned property by another private entity – and that the only relevant constitutional inquiry is whether the public benefits from the condemnation.

The framers of our Constitution drafted the Takings Clause against the background of "a concept of property which permitted extensive regulation of the use of that property for the public benefit. . . . " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting) (citation omitted). Proscribing limits on this power via a restrictive view of public use apparently "was not high among the concerns of those debating the Bill of Rights . . . [as] the framers may well have assumed *that representative government would adequately protect against abuses of eminent domain* . . . ." Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 17-18 (1980) (emphasis added). This is not surprising, given the Lockean premise that the consent necessary for the expropriation of property could be implied from the decision of Parliament to take the property. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 378, 380 (Peter Laslett ed., 1967).

This deferential attitude necessarily informs any understanding of colonial land use policy. During the colonial era, the government often exercised its eminent domain authority, or permitted private individuals to do so on its behalf, in ways which specifically benefited private parties. For example, a number of colonies imposed affirmative use requirements on landowners – so that if a property owner failed to make proper use of his land, he would forfeit title and the land might be sold to another private owner. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1260 (1996). This process occurred in urban settings as well. During the period of Dutch ownership of New York (then New Amsterdam), owners of unimproved lots often forfeited title to the government, which then conveyed those lots to

new purchasers, in return for a "reasonable indemnity at the discretion of the Street Surveyors". *Id.* at 1277-78 (citation omitted).

Nor was unused land the only context in which colonial era state governments exercised the power of eminent domain for the benefit of private entities. Legislatures often redirected private property towards some other private use thought to be more advantageous for the common good – e.g., land thought to be suitable for mills or ironworks, or land being farmed individually that legislators thought better suited for a common field. Hart, *supra* at 1282-83. In addition, eminent domain sometimes was used to take land for private rights-of-way. While these roads often were built to allow landlocked owners access to public highways, many of the roads thus created remained private even though eminent domain had been used to acquire the land for them. Meidinger, *supra* at 14; Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OREGON L. REV. 201, 207 (1978). Finally, a number of states enacted legislation during the colonial era that compelled owners of wetlands to engage in compulsory drainage projects and share the costs of drainage projects for the financial benefit of neighbors who could farm the drained areas. Hart, *supra* at 1270.

Although colonial governments generally were scrupulous about providing compensation for outright takings, their aggressive land use policy speaks volumes with respect to any original understanding of the Takings Clause. As Professor Hart summarizes it, in colonial times

> [t]he preferences of landowners were regularly subordinated to a vision of the public good that embraced many objectives beyond protecting health and safety. In regulating land use, the government sought benefits for the public, not just avoidance of harm. The government often acted simply to encourage a publicly preferred use of private land – to rationalize or optimize private land use.

Id. at 1291.

The notion of using eminent domain authority to achieve a public good – even if the method includes re-transfer to another private owner – did not end with the enactment of the Fifth Amendment. In the late eighteenth and nineteenth centuries, numerous states passed so-called Mill Acts, pursuant to which the owner of downstream land could build a dam to power a mill even if that dam caused the flooding of an upstream owner's land. Berger, *supra* at 206. By 1884, twenty-nine states had such Acts. *Id.*

These mills were not always "analogous to public utilities now and subject to common carrier regulations." (Pet. Brief at 22). In one of the seminal mill cases, *Olmstead v. Camp*, 33 Conn. 532 (1866), the Connecticut Supreme Court permitted a mill owner to flood his neighbor's land, in exchange for compensation, even though the owner was under no legal obligation to grant public access to his mill, or to mill grain himself for the public at-large.[18] *Id.* at 537, 552. In language that would be echoed by this Court more than a century later, the *Olmstead* Court justified its decision by noting that "any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use." *Id.* at 546. That the public had no right of access to, or right to use, the mill itself, did not alter the *Olmstead* Court's conclusion. *Id.* at 551. *Olmstead* was cited favorably by this Court in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 26 (1885).

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[18] *Olmstead* is not alone in this conclusion. See *Harding v. Funk*, 8 Kan. 315, 1871 WL 785 at *7 (1871) ("[i]t has never been deemed essential that the entire community, or considerable portion of it, should directly enjoy or participate in an improvement or enterprise in order to constitute a public use"); *Miller v. Troost*, 14 Minn. 365, 1869 WL 2322 at *2 (1869); *Scudder v. Trenton Delaware Falls Co.*, 1832 WL 2274 at *21 (N.J. Ch. 1832) (mill was for public use even though owners were "under no obligation to let the public participate in the immediate profits of their undertaking"); see also Brief of the American Planning Association, et al., as *Amici Curiae* ("APA Brief") at 9.

The development of our nation's railroads continued this trend of permitting a private company to benefit directly from the taking of private property, so long as the main beneficiary was the public. Indeed, in many of the railroad cases, the power of eminent domain was delegated to the railroad companies themselves, to use as the companies deemed necessary. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S. 386, 393 (1892). Although part of the justification for this was the status of railroads as common carriers and the regulation of the railroad industry by the federal government, that is hardly the end of the story. Indeed, this Court and other courts have permitted railroad condemnations that were not necessary for the assembly of narrow, straight tracts of land, but which were useful to the railway companies' fiscal health. See *Hairston v. Dansville & Western Railroad Co.*, 208 U.S. 598 (1908) (railroad permitted to condemn land for spur track to reach factory of large tobacco shipper); *Wilson v. Pittsburgh & L.E. Railroad Co.*, 72 A. 235 (Pa. 1909) (railroad permitted to condemn private property for water tanks).

Moreover, even those condemnations that involved only the acquisition of land necessary for straight lines of track also involved direct and immediate benefits to the railroad companies – i.e., the massive profits generated by a virtual monopoly on interstate commerce and travel. Although very real, the public goods created by the railroads arose as a by-product of that monopoly. This is not unlike the public benefits from economic development, which, although very real and often substantial, come into being as a result of private profit and private benefit due to an earlier taking.

In sum, the history of land use policy in this country demonstrates a willingness to allow the re-transfer of private property to another private owner to ensure that the property was being put to the most economically beneficial use. Any original understanding of the Takings Clause must take that history into account.

3. The power of eminent domain is a necessary tool in urban development for overcoming barriers to land assembly.

There is another significant similarity between the use of eminent domain for railroads and the use of eminent domain for economic development – a similarity that belies the petitioners' attempt to distinguish the railroad cases. Relying on *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the petitioners assert that railroad cases are unusual because they require "coordination of land assembly . . . and could be thwarted by hold-outs." (Pet. Brief at 21). The petitioners then quote the *Hathcock* Court's distinction of economic development from uses "whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Hathcock*, 684 N.W.2d at 781 (emphasis in original).[16]

What the petitioners refuse to acknowledge is that this very same problem exists to just as great a degree in urban economic development as it does in railroad building. It has long been recognized that eminent domain authority serves the valuable function in our society of providing the means for the government to overcome market barriers that might otherwise halt economic and social progress. See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW §§3.6-3.7 (3rd Ed. 1986); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1175-76 (1967). In this fashion, eminent domain acts as a lubricant for the market machinery, overcoming "barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer." Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986).

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[16] *Hathcock* also holds, solely under the Michigan Constitution, that "public use" is narrower than "public purpose". *Hathcock*, 684 N.W.2d at 775-76. It thus follows a different path than has this Court – a path without sound logical or jurisprudential federal underpinnings. See APA Brief, at 14-19.

In his seminal study of the purpose of the power of eminent domain in a free market, Professor Merrill notes the danger to necessary economic and social development of so-called hold-outs. In a "thin market," where the seller owns property uniquely suitable for the buyer's needs, it "can lead to monopoly pricing by the seller, to unacceptably high transaction costs, or to both." *Id.* Such market barriers often are found in the assembly of the numerous contiguous pieces of land needed for major public or private developments. *Id.* at 75-76. In such a scenario, "each owner is a monopolist, effectively dominating a resource needed to complete the project. Each owner can thereby engage in monopoly pricing, that is, can set his price well above the opportunity cost of the needed resource." *Id.* at 75. This danger is even greater when subjective factors – such as sentimental attachment to the property – enter into the equation. *Id.* at 83. In such a scenario, no amount of money would persuade these sentimental hold-outs to sell, creating a high obstacle to a project for the greater good.

In the urban setting, this assembly problem often is the biggest barrier to development, a fact expressly recognized by the Connecticut legislature. See Conn. Gen. Stat. §§4-66b & 8-186. While the land necessary for economic revitalization in suburban or rural areas often can be acquired from a handful of landowners, in a city assembling a parcel large enough to be of use in improving the city's economy necessitates dealing with dozens of landowners.[17] Indeed, this Court recognized that very dilemma in *Berman*, noting that "[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly." *Berman*, 348 U.S. at 35; see also *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-62 (1896). If a few hold-outs may block a development project designed to renew the

[17] New London is a classic example of the urban assembly problem: a geographically minuscule city composed of hundreds of small properties. See Part II of Respondents' Brief, *infra*.

economic prosperity of a city, opportunities for urban economic development in the near future will be few and far between. Having the tools necessary to overcome these obstacles – including, if necessary, the power of eminent domain – is therefore vital to the economic health of every city in this country. See NLC Brief, at 20-30; CCM Brief, at 3-4 & n.2-3.

4. The inherent transaction costs of eminent domain, and the inherent checks on the abuse of eminent domain that exist in a democracy, provide sufficient assurance that economic development will not render the public use requirement a nullity.

In lieu of a coherent constitutional theory grounded in this Court's prior decisions, the petitioners devote the first half of their brief to an exercise in Chicken Littleism. According to the petitioners, "the unfettered sweep of the [Connecticut Supreme Court's] opinion places all home and small business owners at risk, especially property owners of more modest means." (Pet. Brief at 12). However, the petitioners ignore several important brakes along their slippery slope.

First, there are inherent transaction costs that often make eminent domain an unattractive or even unfeasible alternative for municipalities and would-be developers. According to Professor Merrill:

> First, and most important, legislatures must authorize the exercise of eminent domain. It is thus necessary to persuade a legislature to grant the power of eminent domain, or, if a general grant of the power already exists, to persuade officials to exercise it. Second, the due process clauses of the fifth and fourteenth amendments, as well as local statutes and rules, impose various procedural requirements upon the exercise of eminent domain. At a minimum, these include drafting and filing a formal judicial complaint and service of process on the owner. Third, nearly all jurisdictions require

> at least one professional appraisal of the condemned property, something generally not done (or not done as formally) in a private sale. Finally, both court-made and statutory law guarantee a person whose property is subject to condemnation some sort of hearing on the condemnation's legality and the amount of compensation due.

Merrill, *supra* at 77. These inherent transaction costs were incurred in this case – as well as the more obvious costs of millions of dollars in just compensation and millions more in relocation assistance, none of which will be paid by a private party.[18]

Given these transaction costs, which often make eminent domain a much more expensive method of acquiring property than market exchange, "the decision whether to use eminent domain should be, from an economic perspective, self-regulating." *Id.* at 78. In other words, because it requires the expenditure of significant sums of public money – to plan an economic development project, to acquire the property and to litigate – eminent domain is likely to remain a tool of last resort for municipalities.

Economic self-interest is hardly the only built-in check on eminent domain; political self-interest will have that effect as well. As with the abuse of any form of government power, popular dissatisfaction with the abuse of eminent domain, especially if used for the benefit of private industry, will eventually make itself felt at the ballot box. Indeed, the threat of such electoral consequences likely will act as a deterrent to most questionable uses of the power of eminent domain. Although the petitioners prophesy a world in which

[18] Under Connecticut law, the taking authority must pay the condemnee the full and fair market value of his property and deposit that sum in escrow with the Connecticut Superior Court at the time of the condemnation. See Conn. Gen. Stat. §8-193 (incorporating Conn. Gen. Stat. §§8-129 & 8-130).

churches are replaced by Walmarts, that cynical forecast does not account for the democratic process.[19]

In fact, the petitioners' dire predictions notwithstanding, their brief actually identifies yet another potential check on the abuse of eminent domain – the state courts. The petitioners cite several recent state court decisions striking down an exercise of eminent domain to further economic development as not being for a valid public use. See *Hathcock*, *supra*; *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Southwest Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2002) (*SWIDA*). These cases – which invalidated takings either solely or principally under their respective state constitutions – serve as examples of the healthy balance between state and federal judicial authority necessary in a federalist system of government. Nor is it mere wishful thinking to regard the state courts as the principal bulwarks against the abuse of eminent domain. See Merrill, *supra* at 96-97 (between 1954 and 1985, over 16 percent of state court decisions on public use question invalidated takings as not being for public use); Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 R. PROP., PROBATE & TRUST J. 251, 258 (2004) (over 17 percent between 1986 and 2003).

Finally, to the extent that the petitioners raise the specter of the arbitrary or capricious exercise of the power of eminent domain by municipalities without any judicial check, the Connecticut Supreme Court has demonstrated several times in the past few years that it will not tolerate such nefarious behavior. See *Aposporos*

[19] Eminent domain presents a situation far different from one in which the constitutional rights of a small minority of the population are threatened by the tyranny of the majority because of unpopularity or bigotry. Because the exercise of eminent domain does not single out a particular group, property rights therefore are not subject to attack in the same fashion as the right to free speech or the rights of religious, racial or ethnic minorities.

v. Urban Redevelopment Commission, 790 A.2d 1167 (Conn. 2002) (reversing condemnation due to inadequate findings of blight); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002) (affirming injunction against condemnation due to failure of defendants to consider integration of plaintiff's property); *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of plan adopted in bad faith as pretext to thwart affordable housing).

The Connecticut Supreme Court's opinion in the present case only reinforces that intolerance of municipal misbehavior. First, although it generally adhered to the deference mandated by *Berman* and *Midkiff*, the "primary purpose" standard enunciated in *Kelo* actually is more stringent than either *Berman* or *Midkiff*. This standard presupposes at least some inquiry into the reasons for the legislative or municipal takings decision beyond whether it is "rationally related to a conceivable public purpose". This is buttressed by the Court's detailed discussion of the "particularly egregious set of facts" that led the Illinois Supreme Court to declare a taking unconstitutional in *SWIDA*. The Connecticut Supreme Court's express acknowledgement that it may be appropriate to invalidate a taking when, as in the *SWIDA* case, an agency clearly has exercised its eminent domain authority for the primary benefit of another, specific private entity, belies the petitioners' contention that the *Kelo* decision drains the meaning and substance out of the public use requirement.

II. THE EXERCISE OF EMINENT DOMAIN AUTHORITY BY THE RESPONDENTS IN THIS CASE SATISFIES THE PUBLIC USE REQUIREMENT.

In keeping with this Court's oft-stated rule of great deference to legislative statements of public use, "it is only the taking's purpose, *and not its mechanics*, that must pass scrutiny under the Public Use Clause." *Midkiff*, 467 U.S. at 244. For the reasons that follow, this Court should decline the petitioners' invitation to impose a new and

more rigorous standard of review for compensated takings. However, even under the intrusive system of means-ends scrutiny proposed in the petitioners' brief, the specific benefits that are the likely result of the MDP are more than sufficient for the plan to pass constitutional muster.

A. This Court should adhere to the level of scrutiny traditionally employed for compensated takings.

For the reasons discussed in more detail *supra*, this Court has been loath to scrutinize a legislative determination as to whether an economic decision serves a public purpose. Courts are not only institutionally unsuited to making such predictive judgments, but also are unbound by the restraints of the democratic process that limit elected officials. As such, great deference to legislative decision-making in this area is the proper judicial role. See *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928).

This Court employs precisely the same deference in the Takings Clause context. In fact, the Court has never imposed any form of heightened scrutiny with respect to a compensated taking, even though several of this Court's cases involved takings for the benefit of a private party. See NLC Brief at 8-11. To the contrary, in *National Railroad*, after concluding that the condemnation and re-transfer to a private party was a proper public use, this Court declined to "make a specific factual determination whether the condemnation will accomplish its objectives." *National Railroad*, 503 U.S. at 422-23. The Court has required greater scrutiny only with respect to uncompensated exactions; i.e., when the government conditions the grant of a building permit on the permittee's willingness to allow a public right-of-way across his property. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, *supra*.

The *Nollan/Dolan* rule – which requires a "nexus" between some substantial public purpose and the means chosen to achieve that interest and, if such a nexus exists, "rough proportionality" between the government-imposed

condition and the anticipated impacts of the permitted construction – makes sense only in the narrow realm of uncompensated exactions. See *Dolan*, 512 U.S. at 385, 391; *Nollan*, 483 U.S. at 836 n.3, 837. Indeed, this Court expressly held as much in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999).

The need for heightened scrutiny in the *Nollan/Dolan* scenario was born out of the concern that the government might use a property owner's desire for a permit to compel the owner's acquiescence to a permanent physical occupation of his property – an occupation that otherwise would constitute a *per se* taking requiring compensation. See *Nollan*, 483 U.S. at 834. In other words, the concern was that the government would use the permitting process as an end-run around the just compensation requirement. This concern obviously does not apply to the *compensated* takings in this case. See *First English*, 482 U.S. at 314-15.

The "reasonable certainty" test proposed by the petitioners for takings involving a re-transfer of the condemned property lacks any foundation in either logic or this Court's jurisprudence. The petitioners cite only one decision of this Court as even arguably supporting heightened scrutiny: *United States v. Gettysburg Electric R. Co.*, 160 U.S. at 680. However, the quoted *dicta* in *Gettysburg* must be read in light of its actual holding:

> [W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

Id. Indeed, *Midkiff* expressly relies on *Gettysburg* in its formulation of the deferential standard of review on public use.[20] *Midkiff*, 467 U.S. at 241.

[20] The petitioners also cite *Cincinnati v. Vester*, 281 U.S. 439 (1930), for the proposition that a public use must be "a known use" in order to pass constitutional muster. The petitioners simply ignore the fact that this Court expressly refused to decide the constitutional issue presented

(Continued on following page)

The petitioners' other arguments are equally meritless. Their (somewhat mutually contradictory) assertions that the benefits of the MDP are too speculative, and that it is not necessary to take the petitioners' properties in order to achieve those benefits, are discussed *infra* in Section IIB. Their claim that heightened scrutiny is warranted because "[e]minent domain forces some people to bear a burden that should be, but cannot be, borne by all[,]" (Pet. Brief at 32), says nothing unique about either eminent domain for economic development or about re-transfer cases. After all, in *every instance that it is used*, the power of eminent domain places a greater burden on certain individuals than society at large – this is true for roads, schools, prisons, all of the "traditional" public uses lauded by the petitioners. The constitutional remedy for that (however little the petitioners wish to acknowledge it) is just compensation.

In sum, there simply is no principled reason to impose – for the first time with respect to compensated takings – a heightened degree of scrutiny. This Court has never countenanced such an interference with the legislative and municipal prerogative and it should not do so here. So long as a taking is related to a rational public purpose, this Court should do what it did in *National Railroad* and uphold the taking.

B. Under any standard of review, the takings in this case satisfy the public use requirement.

It is clear that, as a general matter, economic development satisfies the public use requirement, even when that development takes place through the medium of re-transfer to a private entity. In the present case, the need for such development is undisputed – the petitioners quibble only with the efficacy and necessity of the methods chosen by the respondents and set forth in the MDP to achieve the asserted public purpose. However, those quibbles are not

in *Vester* because the case could be resolved on a point of Ohio statutory law. *Id.* at 448-49.

supported by the factual record. To the contrary, the facts demonstrate that there is more than a reasonable likelihood that the projected benefits of the MDP will come to pass and that the proposed takings are therefore necessary to the economic rejuvenation of New London.[21]

New London's severe economic distress, discussed in detail *supra*, makes the need for economic revitalization much more compelling than would be the case in a city that was thriving. In any takings situation, a municipal exercise of eminent domain power must bear some rational relationship to a problem of which the correction is within the sphere of the police power. *Midkiff*, 467 U.S. at 240. Therefore, the more severe the problem, the more necessary is a municipal response to it, if municipal authorities are to fulfill their role to adjust "the burdens and benefits of economic life. . . . " *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, the MDP already has resulted in significant non-economic benefits for the people of New London. These immediate benefits include large-scale environmental remediation; creation of public access to the Thames River via the Riverwalk; improvements to the city's roads, sewers, water and power lines; and the filling of flood plain areas. (J.A. 140-41, 143-47, 159-60, 180-81, 442-43, 718-21).

It is equally as important that the MDP was not a hastily cobbled-together midnight deal. It was the product

[21] For the reasons set forth in Sections IA and IIA, the respondents believe that it would be inappropriate for this Court to adopt a heightened standard of proof for economic development takings. However, it is noteworthy that the Connecticut Supreme Court, in considering whether the claimed public benefits of the MDP would come to pass, required a finding of "reasonable assurances of future public use. . . . " (Pet. App. 73). If the petitioners are attempting to impose an even stricter standard of proof with their "reasonable certainty" test, they simply are trying to halt most economic development condemnations through the back door of an unreasonable standard of proof. To paraphrase the Connecticut Supreme Court, it would be hard to see how predictions of future economic events *ever* can be proved with the high level of certainty proposed by the petitioners. (Pet. App. 74 n.62).

of a comprehensive and public process designed to alleviate many of New London's problems by creating thousands of jobs, greatly increasing the city's tax revenues and modernizing its building stock, streets and sewers. This process included a detailed analysis of six possible options for the MDP. See note 10, *supra*. Thereafter, a detailed marketing study was conducted by a potential developer, Corcoran Jennison, which ultimately was selected from a group of applicants to be the developer for much of the MDP. (J.A. 30-82; Pet. App. 66). Moreover, contrary to the suggestion in the petitioners' brief, the NLDC, and any private developers to whom property is leased, will not simply be left to run things as they see fit while the city and its residents hope that these benefits materialize. In fact, the MDP is subject to numerous statutory and contractual controls.

Chief among these is Conn. Gen. Stat. §8-189, which requires multiple and specific details in any development plan regarding the need for development and the benefits of the proposed plan – e.g., a statement of the number of jobs to be created; a marketability plan; a financing plan; an administrative plan; and a finding that the plan will contribute to the economic welfare of the municipality and the state. *Id.* Section 8-189 also requires oversight of the development by the state to ensure that any development plan conforms to state regulations and other statewide and regional plans of development. *Id.* Furthermore, in Connecticut, no municipality can use eminent domain for economic development without the approval of the Executive Branch and continued state oversight. All of those requirements were met in this case.

A number of other statutes provide control over economic development plans as well. See Conn. Gen. Stat. §8-190 (state may make planning grants and advise development agency); Conn. Gen. Stat. §8-191 (state must approve final development plan if state grants have been made); Conn. Gen. Stat. §8-193(a) (if state grants have been made, department and city must approve land transfers by sale or lease in accordance with plan); and Conn. Gen. Stat. §8-200(a) ("substantial" changes to development plan require approval in same manner as original plan). In fact, the

state itself is a "signatory to the development agreement; it 'provides the funding without which nothing goes forward.'" (Pet. App. 74). The MDP, and any modifications thereto, is in effect for 30 years, and any parcel in the plan area must be devoted principally to the uses contemplated by the MDP. (Pet. App. 75 & n.64).

In accordance with these statutory controls, both the trial court and the Connecticut Supreme Court concluded that state and city would have sufficient control over the NLDC to ensure that neither it nor any private developer leasing any part of the property would be "able to act according to its own 'will and caprice'. . . . " (Pet. App. 75 n.63). This conclusion is buttressed by the MDP's requirement that any redeveloper

> [agree] for itself and its successors and assigns as successors in interest to the parcel, or any part thereof, that the deed conveying the Parcel shall contain language covenanting on the part of Redeveloper and its successors and assigns that:
>
> The Parcel shall be devoted principally to the uses contemplated by the Plan, and shall not be used or devoted for any other purpose, or contrary to any of the limitations or requirements of said Plan. *All improvements made pursuant to the Plan and this Agreement shall be used in accordance with the Plan unless prior written consent is given by the [development corporation] and [department] for a different use;*
>
> The Parcel shall not be sold, leased, or otherwise disposed of for the purposes of speculation.

(Pet. App. 75 n.64) (emphasis added). These contractual obligations act as a bar to any future redeveloper that might lease property in the MDP area from the NLDC from making use of the property in a way not in accordance with the MDP. Moreover, these obligations are buttressed by the fact that the redeveloper will not own the property, but will lease it from the NLDC. There is also no evidence that any non-governmental entity will pay any portion of the just compensation to the petitioners.

Taken together, these statutory and contractual controls give reasonable assurance that it is the State of Connecticut and the City of New London, and not either the NLDC or those developers to whom space is leased, which will exercise final control over the future of the MDP. Indeed, although the city has designated the NLDC as its agent for economic development pursuant to §8-188, nothing in that statute, or Connecticut law in general, prevents that designation from being withdrawn. In that sense, the city always has the ultimate form of control over the NLDC because the city can take away all of the NLDC's power by simply un-designating it. (Pet. App. 219).

The same reasonable assurance exists that the proposed benefits to New London's economy and infrastructure are likely to take place. With respect to Parcel 3, the petitioners have taken a few isolated comments from a marketing study performed in 2000 by Corcoran Jennison (the company designated to lease the office space in Parcel 3) and simply ignored the many other parts of the record that demonstrate the viability of the use of Parcel 3. For example, that very same marketing study found that "rental rate and occupancy trends [in New London] have been generally positive over the past few years. . . . " (J.A. 38). The study characterizes the market for Class A office space in New London as "quite healthy," and notes that "there has been a positive demand for Class A & B office space over the past four years. Between October 1996 and October 1999, *approximately 185,000 square feet were absorbed in New London*." (J.A. 41-42) (emphasis added). It is telling that the petitioners' brief never addresses this fact.[22] In addition,

[22] The petitioners' assertion that the office space will only be built at some unknown, and likely far-off, time in the future also is belied by the facts. According to the record, Corcoran Jennison "intend[ed] to select a brokerage firm no later [than] March 31, 2001 and to commence the marketing of the commercial space as soon as possible thereafter." (J.A. 75-76). Indeed, a careful examination of the very time-line trumpeted by the petitioners in their brief shows that – were it not for the current litigation – much of the office space slated for Parcel 3 could have been either completed or under construction. (J.A. 46-48, 73).

there was ample testimony that the presence of Pfizer in New London would act as a spur in the commercial real estate market in keeping with the demand for office and research space envisioned by Parcel 3.[23]

The proposed uses for Parcel 4A also are sufficiently well-defined. As the Connecticut Supreme Court opinion notes, the MDP envisions two uses for Parcel 4A: park support and marina support.[24] (Pet. App. 125-26; J.A. 111-12). Understood in their proper context – the size of Parcel 4A, and its placement within the overall plan for Fort Trumbull – these proposed uses are not speculative. Parcel 4A is 2.4 acres in size and is situated in the middle of the plan area, sandwiched between a waste water treatment facility and Fort Trumbull State Park. (J.A. 4). It is the only parcel which can possibly be used to connect the rest of the project to the marina and Fort Trumbull State Park. It certainly is not irrational to designate a small parcel of land adjoining a 16-acre state park for park support, especially when that parcel's other principal neighbor, a waste water treatment facility, makes it less suitable for other functions. The same thing is true regarding use of Parcel 4A for marina support because immediately to the south of Parcel 4A is Parcel 4B, which is slated to contain a marina. Viewed in light of its location, the proposed uses of Parcel 4A make a great deal of sense.

That the 90-acre plan area itself is surrounded on three sides by water has an obvious impact on the uses of Parcel

[23] The petitioners' assertion that the clear intent of the MDP was to benefit Pfizer, rather than merely to take advantage of its presence in the city, is not only contradicted by the findings of the trial court and the majority opinion of the Connecticut Supreme Court, but by the *dissent* as well. (Pet. App. 70-71, 176). Moreover, as the majority opinion notes, Pfizer's supposed "requirements," which is the only evidence proffered by the petitioners of any intent to benefit Pfizer, do not impact Parcels 3 and 4A. (Pet. App. 65, 69). Furthermore, Pfizer will have no ownership or management interest in any of the facilities in the plan area. (Pet. App. 63).

[24] Another possible use of Parcel 4A is for a United States Coast Guard Museum. (Pet. App. 126-27).

4A. (J.A. 4). It means that parking, and most other park or marina support facilities, cannot go in those directions. This supports the reasonableness of the taking of Parcel 4A for those uses. Not to take Parcel 4A also would leave 11 tiny plots – totaling 0.76 acres – completely surrounded by a 90-acre development project that cannot expand in three directions due to its peninsular nature.

Furthermore, to the extent that the petitioners argue that these proposed uses are too speculative, that argument is actually no more than a thinly-disguised attempt to trap the city between a constitutional Scylla and Charibdis. On the one hand, the petitioners note the constitutional bar against takings designed solely to benefit a private party. See *Midkiff*, 467 U.S. at 245. So, if an economic development plan were to contain very specific details as to specific private companies that were going to be given the use of properties taken through eminent domain, that in the petitioners' view would run afoul of the public use requirement because those private companies, and not the public, would be the true beneficiaries of the takings. On the other hand, the petitioners want this Court to bar any plan unless it states who will develop the condemned land and for what specific uses. Of course, it is precisely economically-distressed cities that have the most difficulty in enticing private developers to commit themselves to urban revitalization – and it is these same cities (and their millions of residents) that will be the losers if they must prove to a high degree of certainty that their plans will succeed. This sort of gamesmanship – which ignores the clear distinction between judicial review of the overarching public use and judicial review of the means by which that use is implemented – cannot be what the constitution intended. As this Court said in *Rindge*, *supra*, 262 U.S. at 707, a public use may be a use "fairly anticipated in the future."

Finally, the petitioners contend that, because their properties "comprise a miniscule portion of the land" in the MDP, it is not necessary to take their properties in order to advance the public good. (Pet. Brief at 48). In *Berman*, this Court rejected an identical argument by the owners of a

non-blighted department store situated in the part of Washington designated for redevelopment. *Berman*, 348 U.S. at 31, 34. The store owners claimed that, because "their building [did] not imperil health or safety nor contribute to the making of a slum or a blighted area," *id.* at 34, it should have been exempted from the dictates of the District redevelopment. In response, this Court emphatically rejected such a piecemeal approach. The Court deferred to the expertise of the legislators and administrators who formulated the redevelopment and held:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, *the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

Id. at 35-36 (emphasis added).

A property-by-property approach to the question of constitutionality would pose just as grave a threat to the integrated plan in this case as it did in *Berman*. First, as *Berman* intimates, it would be incongruous, to say the least, to have the federal courts micromanage state and local development projects. Not only are judges professionally ill-suited to such a role, but that sort of heavy-handed intrusion into state and local affairs does not comport with our federalist system of government.

Second, there is the "spotted leopard" problem.[25] This occurs when there are small parcels of untouchable land scattered within an area set for development. It is an enormous hindrance for the project as a whole to have to build around these so-called spots. For example, much of the MDP area will be raised above the flood plain. Obviously, this cannot take place if there are little exempted

[25] According to the record, the residential properties are "scattered throughout the MDP area contributing to a sawtooth visual impression in the various blocks." (J.A. 323); see also (Pet. App. 301-305).

islands of property within the area to be raised. For this and other reasons, building around the petitioners is not a feasible alternative. Moreover, even if development of the property could go forward, the spotted leopard problem would be just as great a hindrance once the development was complete. It is important to remember that the land in Parcels 3 & 4A has been zoned for commercial and light industrial use for decades and, under the MDP, will be zoned for "water dependent and water related industrial and major commercial use. . . . " (J.A. 114, 116, 126). The properties, which cannot be renovated for commercial use, therefore will simply be incompatible with all of the uses going on around them.

Indeed, this is another important facet of the assembly problem faced by cities. See *supra*, Section IB3. In suburban and rural areas, there generally is no spotted leopard problem because the land needed for development often can be acquired through the marketplace from a few owners. In cities, however, properties are generally much smaller in size and owned by many more individuals. As such, a city that wants to improve a downtrodden economy and revamp its infrastructure must contend with the spotted leopard. Too often, the result is the exodus of businesses and developers to the suburbs and the creation of still more suburban sprawl.

The condemnation of the petitioners' properties is clearly rational. If the Court believes that a higher standard should be imposed for compensated takings, this case falls on the constitutional side of any reasonable line. New London is economically downtrodden and has given all of the assurances of successful development that reasonably can be expected of a city. The respondents have provided a carefully thought-out and publicly-vetted plan with state and local oversight; a plan that is subject to detailed statutory and contractual requirements; and an economic revitalization area designed to capture the maximum benefit from being located next door to a $300,000,000 global research facility that was almost completed by the time the NLDC condemned the petitioners' properties. To ask for any more would be asking for an absolute guarantee of the future – and that is a standard too harsh for any city to satisfy.

For most of this century, our courts have followed the time-honored "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). The power of eminent domain, although formidable, is merely one of the many tools that the Constitution grants to the legislative branch in order to fulfill its role as the progenitors of economic and social policy. Contrary to the petitioners' assertion that a ruling in their favor would have only a limited impact, such a ruling would result in a seismic shift in our constitutional landscape that would upset not only the careful balance between judicial and legislative authority, but would also result in the intrusion of federal courts into state and local affairs.

CONCLUSION

For the foregoing reasons, the judgment of the Connecticut Supreme Court should be affirmed.

Respectfully submitted,

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Connecticut Statutes

Sec. 4-66b. Capital development impact statements. The Secretary of the Office of Policy and Management shall develop a form for capital development impact statements on which state agencies shall indicate the manner in which a planned or requested capital project or program addresses the following goals: (1) Revitalization of the economic base of urban areas by rebuilding older commercial and industrial areas, and encouraging new industries to locate in the central cities in order to protect existing jobs and create new job opportunities needed to provide meaningful economic opportunity for inner city residents; (2) revitalization of urban neighborhoods to reduce the isolation of various income, age and minority groups through the promotion of fair and balanced housing opportunities for low and moderate income residents; (3) revitalization of the quality of life for the residents of urban areas by insuring quality education, comprehensive health care, access to balanced transportation, adequate recreation facilities, responsive public safety, coordinated effective human service programs, decent housing and employment and clean water and by insuring full and equal rights and opportunities for all people to reap the economic and social benefits of society; (4) coordination of the conservation and growth of all areas of the state to insure that each area preserves its unique character and sense of community and further insure a balanced growth and prudent use of the state's resources.

CHAPTER 135

DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT: UNIFORM RELOCATION ASSISTANCE ACT

Sec. 8-266. Short title: Uniform Relocation Assistance Act. Purpose. Policy. This chapter shall be known as the "Uniform Relocation Assistance Act". The purpose of this chapter is to establish a uniform policy for the fair and equitable treatment of persons displaced by the acquisition of real property by state and local land acquisition programs, by building code enforcement activities, or by a program of voluntary rehabilitation of buildings or other improvements conducted pursuant to governmental supervision. Such policy shall be uniform as to (1) relocation payments, (2) advisory assistance, (3) assurance of availability of standard housing, and (4) state reimbursement for local relocation payments under state assisted and local programs.

Sec. 8-267. Definitions. As used in this chapter:

(1) "State agency" means any department, agency or instrumentality of the state or of a political subdivision of the state, or local housing authorities, or any department, agency or instrumentality of two or more political subdivisions of the state, but shall not include community housing development corporations authorized under section 8-217;

(2) "Person" means any individual, partnership, corporation, limited liability company or association;

(3) "Displaced person" means (a) any person who, on or after July 6, 1971, moves from real property, or moves

his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by or supervised by a state agency or unit of local government and solely for the purposes of subsections (a) and (b) of section 8-268 and section 8-271 as a result of the acquisition of or as a result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project; or (b) any person who so moves as the direct result of code enforcement activities or a program of rehabilitation of buildings pursuant to such governmental program or under such governmental supervision, except a business which moves from real property or which moves its personal property from real property acquired by a state agency when such move occurs at the end of a lease term or as a result of eviction for nonpayment of rent, provided the state agency acquired the property at least ten years before the move;

(4) "Nonprofit organization" means associations incorporated under chapters 598 and 600;

(5) "Business" means any lawful activity, excepting a farm operation, conducted primarily (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing or marketing of products, commodities or any other personal property; (B) for the sale of services to the public; (C) by a nonprofit organization; or (D) solely for the purposes of subsection (a) of section 8-268, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays,

whether or not such display or displays are located on the premises on which any of the above activities are conducted;

(6) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support;

(7) "Mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of this state, together with the credit instruments, if any, secured thereby.

Sec. 8-267a. Compliance with federal Uniform Relocation Assistance and Real Property Acquisition Policies Act. All state agencies, as defined in section 8-267, are authorized to comply with the applicable provisions of 42 USC Sections 4601-4655 and any subsequent amendments, for the purpose of participating in a federal or federally assisted project or program.

Sec. 8-268. Payment for displacement expenses and losses. Moving expenses and dislocation allowances. Fixed payments. Landlord's responsibility in certain cases. (a) Whenever a program or project undertaken by a state agency or under the supervision of a state agency will result in the displacement of any person on or after July 6, 1971, the head of such state agency shall make payment to any displaced person, upon proper

application as approved by such agency head, for (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the state agency, and (3) actual reasonable expenses in searching for a replacement business or farm, provided, whenever any tenant in any dwelling unit is displaced as the result of the enforcement of any code to which this section is applicable by any town, city or borough or agency thereof, the landlord of such dwelling unit shall be liable for any payments made by such town, city or borough pursuant to this section or by the state pursuant to subsection (b) of section 8-280, and the town, city or borough or the state may place a lien on any real property owned by such landlord to secure repayment to the town, city or borough or the state of such payments, which lien shall have the same priority as and shall be filed, enforced and discharged in the same manner as a lien for municipal taxes under chapter 205.

(b) Any displaced person eligible for payments under subsection (a) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive a moving expense allowance, determined according to a schedule established by the state agency, not to exceed three hundred dollars and a dislocation allowance of two hundred dollars.

(c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who

elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall not be less than two thousand five hundred dollars nor more than ten thousand dollars. In the case of a business no payment shall be made under this subsection unless the state agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the state, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one half of any net earnings of the business or farm operation, before federal, state and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse or his dependents during such period.

Sec. 8-269. Additional payment to owner displaced from dwelling. (a) In addition to payments otherwise authorized by this chapter, the state agency shall make an additional payment not in excess of fifteen thousand dollars to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty

days prior to the initiation of negotiations for the acquisition of the property. Such additional payment shall include the following elements: (1) The amount, if any, which when added to the acquisition cost of the dwelling acquired, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private market. All determinations required to carry out this subparagraph shall be made by the applicable regulations issued pursuant to section 8-273; (2) the amount, if any, which will compensate such displaced person for any increased interest cost which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount shall be paid only if the dwelling acquired was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of such dwelling. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate on savings deposits by commercial banks in the general area in which the replacement dwelling is located; (3) reasonable expenses incurred by such displaced person for evidence of title, recording fees and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(b) The additional payment authorized by this section shall be made only to such a displaced person who purchases and occupies a replacement dwelling which is decent, safe and sanitary not later than the end of the one year period beginning on the date on which he receives final payment of all costs of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date.

Sec. 8-270. Additional payment for persons displaced from dwelling. Landlord's responsibility in certain cases. In addition to amounts otherwise authorized by this chapter, a state agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 8-269 which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling under the program or project which results in such person being displaced. Such payment shall be either (1) the amount necessary to enable such displaced person to lease or rent for a period not to exceed four years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment, but not to exceed four thousand dollars, or (2) the amount necessary to enable such person to make a downpayment, including reasonable expenses incurred by such displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not

generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed four thousand dollars, except that if such amount exceeds two thousand dollars, such person must equally match any such amount in excess of two thousand dollars in making the downpayment, and provided, whenever any tenant in any dwelling unit is displaced as the result of the enforcement of any code to which this section is applicable by any town, city or borough or agency thereof, the landlord of such dwelling unit shall be liable for any payments made by such town, city or borough pursuant to this section or by the state pursuant to subsection (b) of section 8-280, and the town, city or borough or the state may place a lien on any real property owned by such landlord to secure repayment to the town, city or borough or the state of such payments, which lien shall have the same priority as and shall be filed, enforced and discharged in the same manner as a lien for municipal taxes under chapter 205.

Sec. 8-270a. Actions against landlords by towns, cities and boroughs and the state. If any landlord fails to reimburse any town, city or borough for any payments which the town, city or borough has made to any displaced tenant and for which the landlord is liable pursuant to section 8-268 or 8-270, such town, city or borough or the state pursuant to subsection (b) of section 8-280 may bring a civil action against such landlord in the superior court for the judicial district in which the town, city or borough is located or for the judicial district in which such landlord resides for the recovery of such payments, and for the costs, together with reasonable attorney's fees, of the town, city or borough or the state in bringing such action. In any such action, it shall be an

affirmative defense for the landlord that the displacement was not the result of the landlord's violation of section 47a-7.

Sec. 8-271. Relocation assistance advisory program. (a) Whenever a program or project undertaken by a state agency or under the supervision of a state agency will result in the displacement of any person on or after July 6, 1971, such agency shall provide a relocation assistance advisory program for displaced persons which shall offer the services described herein. If the state agency determines that any person occupying property immediately adjacent to any real property acquired is caused substantial economic injury because of such acquisition, it may offer such person relocation advisory services under such program.

(b) Each relocation advisory assistance program required by subsection (a) shall include such measures, facilities, or services as may be necessary or appropriate in order (1) to determine the needs, if any, of displaced persons for relocation assistance; (2) to provide current and continuing information on the availability, prices and rentals, of comparable decent, safe and sanitary sales and rental housing, and of comparable commercial properties and locations for displaced businesses; (3) to assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe and sanitary dwellings, as defined by the Commissioner of Transportation for transportation projects and by the

Commissioner of Economic and Community Development for all other state agency programs and projects, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment, except that the Commissioner of Transportation for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects may prescribe by regulation situations when such assurances may be waived; (4) to assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location; (5) to supply information concerning federal and state housing programs, disaster loan programs and other federal and state programs offering assistance to displaced persons; (6) to provide other advisory assistance services to displaced persons in order to minimize hardship to such persons in adjusting to relocation.

(c) The heads of state agencies shall coordinate relocation activities with project work, and other planned or proposed governmental actions in the community or nearby areas which may affect the carrying out of the relocation assistance programs.

Sec. 8-272. Necessity of provision of housing. (a) If a project or program cannot proceed to actual construction because comparable replacement sale or rental housing is not available, and the Commissioner of Transportation for transportation projects or the Commissioner of Economic and Community Development for any other state agency program or project determines that such

housing cannot otherwise be made available after consultation with the chief executive officer of the municipality within which such project or program occurs, he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project or program, the provisions of any other state statute to the contrary notwithstanding.

(b) No person shall be required to move from his dwelling on or after July 6, 1971, on account of any state agency project or program unless the Commissioner of Transportation for transportation projects or the Commissioner of Economic and Community Development for any other state agency program or project is satisfied that replacement housing, in accordance with subdivision (3) of subsection (b) of section 8-271 is available to such person.

Sec. 8-273. Establishment of regulations and procedures. (a) In order to promote uniform and effective administration of relocation assistance and land acquisition of state agencies, the Commissioner of Transportation and Commissioner of Economic and Community Development shall consult together on the establishment of regulations and procedures for the implementation of such projects and programs.

(b) The Commissioner of Transportation is authorized to establish for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects such regulations and procedures as each may determine to be necessary to assure (1) that the payments and assistance authorized by this chapter shall be administered in a manner which is fair and reasonable, and as uniform as

practicable; (2) that a displaced person who makes proper application for a payment authorized for such person by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance; and (3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the Commissioner of Transportation for transportation projects and by the Commissioner of Economic and Community Development for any other state agency program or project.

(c) The Commissioner of Transportation is authorized to establish for transportation projects and the Commissioner of Economic and Community Development for all other state agency programs and projects such other regulations and procedures, consistent with the provisions of this chapter, as each deems necessary or appropriate to carry out this chapter.

Sec. 8-273a. Relocation assistance by the Department of Transportation. Notwithstanding any other provisions of the general statutes to the contrary, whenever the Commissioner of Transportation undertakes the acquisition of real property on a state or federally-funded project which results in any person being displaced from his home, business, or farm, the Commissioner of Transportation is hereby authorized to provide relocation assistance and to make relocation payments to such displaced persons and to do such other acts and follow procedures and practices as may be necessary to comply with or to provide the same relocation assistance and relocation payments as provided under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of

1970, 42 USC 4601 et seq. and any subsequent amendments thereto and regulations promulgated thereunder.

Sec. 8-274. Contracts and agreements for services. In order to prevent unnecessary expenses and duplications of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons authorized under this chapter, the Commissioner of Transportation may, for transportation projects, and the Commissioner of Economic and Community Development may, for all other state agency programs or projects, enter into contracts or agreements with any individual, firm, association, or corporation for services in connection with such projects or programs, or may carry out its functions under this chapter through any federal, state or local governmental agency or instrumentality having an established organization for conducting relocation assistance programs. A state agency shall, in carrying out the relocation assistance activities described in section 8-272, whenever practicable, utilize the services of state or local housing agencies, or other agencies having experience in the administration or conduct of similar housing assistance activities.

Sec. 8-275. Availability of funds. Funds appropriated or otherwise available to any state agency for a particular program or project, or for the acquisition of real property or any interest therein for a particular program or project, shall be available also for obligation and expenditure to carry out the provisions of this chapter as applied to that program or project.

Sec. 8-276. Cost of payments and services included in project costs. If a state agency acquires real property, and state financial assistance is available to pay the cost, in whole or part, of the acquisition of such real property, or of the improvement for which such property is acquired, the cost to the state agency of providing the payments and services prescribed by this chapter shall be included as part of the costs of the project for which state financial assistance is available to such municipality and shall be eligible for state financial assistance in the same manner and to the same extent as other project costs.

Sec. 8-277. Payments to displaced persons not considered income or resources. No payment received by a displaced person under this chapter shall be considered as income or resources for the purpose of determining the eligibility or extent of eligibility of any person for assistance under any state law or for the purposes of the state's personal income tax law, corporation tax, or other tax laws. Such payments shall not be considered as income or resources of any recipient of public assistance and such payments shall not be deducted from the amount of aid to which the recipient would otherwise be entitled.

Sec. 8-278. Appeals to commissioners. Any person or business concern aggrieved by any agency action, concerning their eligibility for relocation payments authorized by this chapter may appeal such determination to the Commissioner of Transportation in the case of relocation made necessary by a transportation project or to the Commissioner of Economic and Community Development in the

case of relocation made necessary by any other state agency program or project. The Commissioner of Transportation and the Commissioner of Economic and Community Development shall have the power to certify official documents and to issue subpoenas to compel the attendance of witnesses or the production of books, papers, correspondence, memoranda or other records deemed necessary as evidence in connection with an appeal pursuant to this section. If any person to whom such subpoena is issued fails to appear, or having appeared refuses to give testimony or fails to produce the evidence required, the Superior Court, upon application of the Attorney General representing the appropriate commissioner, shall have jurisdiction to order such person to appear or to give testimony or produce the evidence required, as the case may be. The Commissioner of Transportation, or a hearing officer duly appointed by said commissioner, or the Commissioner of Economic and Community Development, or a hearing officer duly appointed by said commissioner, shall have the power to administer oaths and affirmations in connection with an appeal pursuant to this section.

Sec. 8-279. Application of chapter. (a) Nothing in this chapter shall be construed as creating in any condemnation proceedings, brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to July 6, 1971.

(b) No payment provided for any item or items under the provisions of this chapter shall be made by the state agency if reimbursement for such item or items has been made in a condemnation proceeding.

(c) Nothing in this chapter, shall be construed to limit, restrict or derogate from any power, right or authority of a state agency or any commissioner thereof, contained in any other statute, to proceed with any programs, projects or activities within such state agency's or commissioner's power to accomplish under such statutes.

(d) If Congress enacts legislation permitting, or giving the states the option, to make payments for relocation assistance of a lesser amount than is provided for in this chapter, or in Public Law 91-646, or as amended at a later date, the state agency shall make the payments in such lesser amount, notwithstanding the provisions of this chapter.

(e) All state agencies charged with preparing relocation plans or carrying out such plans pursuant to the provisions of this chapter shall file such plans with the Commissioner of Economic and Community Development who shall maintain a file of such plans which may be inspected at reasonable times by any person, owner or lessee of any affected business or farm, or governmental agency.

(f) This chapter shall apply to any displacement of a person occurring within the state of Connecticut as a result of a state agency program or project, notwithstanding the source of funding for such program or project.

Sec. 8-280. State grants-in-aid. Conditions. (a) The state, acting by and in the discretion of the Commissioner of Economic and Community Development, may enter into a contract or agreement with a state agency to provide state financial assistance to such state agency in

the form of a grant-in-aid equal to two-thirds of the net cost of carrying out a program of relocation assistance pursuant to a relocation plan as provided under section 8-281 and approved by the commissioner. Such grant-in-aid shall: (1) Provide actual administration costs not to exceed one hundred dollars for each dwelling unit and two hundred fifty dollars for each farm or business relocated in accordance with the provisions of this chapter; (2) provide advance grants for relocation assistance paid pursuant to the provisions of said section to persons, families, businesses and farm operations and nonprofit organizations not otherwise entitled to relocation assistance from any program of any other state agency or any program of the federal government and who have not been reimbursed for moving costs in a condemnation proceeding; (3) include the cost of the preparation of the relocation plan.

(b) The Commissioner of Economic and Community Development shall not provide a grant-in-aid pursuant to subsection (a) of this section to any town, city or borough for the cost of carrying out a program of relocation assistance for persons displaced as the direct result of code enforcement activities undertaken by a town, city or borough, unless such town, city or borough (1) places, pursuant to section 8-270, a lien on all real property in such town, city or borough, which is owned by the landlord of the persons who are displaced by such code enforcement activities, and (2) assigns to the state the claim of the town, city or borough against such landlord for the costs of carrying out such program of relocation assistance. The Attorney General shall be responsible for collecting such claim and may carry out such responsibility by (A) enforcing any such lien assigned to the state by the town, city or borough, (B) placing and enforcing a lien on any other real

property owned by the landlord in the state or (C) instituting civil proceedings in the Superior Court against such landlord. Two-thirds of all funds collected by the Attorney General from a landlord pursuant to this subsection shall be deposited in the General Fund and the remaining one-third of such funds shall be remitted to the town, city or borough which brought code enforcement activities against such landlord.

Sec. 8-281. Approval of relocation plan required for receipt of state grant-in-aid. To be eligible to receive financial assistance under section 8-280, a state agency shall cause to be prepared and file with the Department of Economic and Community Development for the approval of the commissioner a relocation plan based upon a plan or program of governmental action within the area of operation of the state agency which will cause the displacement of persons, families, businesses, farm operations and nonprofit organizations. Such relocation plan shall conform to the provisions of this chapter and shall include but not be limited to the following: (a) The number of persons, families, businesses and farms to be displaced by the proposed governmental action; (b) a statement concerning availability of sufficient, suitable accommodations as shall meet the requirements for occupancy of those persons, families, businesses and farms displaced and the dates when such accommodations will be available; (c) a plan for carrying out the relocation of such displaced persons, families, businesses and farms; (d) a description and identification of the area to be affected.

Sec. 8-282. Reimbursement for fees, penalty costs, taxes. In addition to amounts otherwise authorized by sections 8-266 to 8-281, inclusive, the state agency, as defined in section 8-267, shall reimburse the owner of real property acquired for a project for reasonable and necessary expenses incurred for (1) recording fees, transfer taxes and similar expenses incidental to conveying such real property; (2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such property; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the state, or the effective date of possession of such real property by the state agency, whichever is earlier.

CHAPTER 439

ENVIRONMENTAL PROTECTION DEPARTMENT AND STATE POLICY

Sec. 22a-1. Policy of the state. The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. It is now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. It shall further be

the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

Sec. 22a-1a. Declaration of policy: Coordination of state plans and programs. (a) In furtherance of and pursuant to sections 22a-1 and 22a-15, the General Assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influence of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Connecticut residents.

(b) In order to carry out the policy set forth in sections 22a-1a to 22a-1f, inclusive, it is the continuing

responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may: (1) Fulfill the responsibility of each generation as trustee of the environment for succeeding generations; (2) assure for all residents of the state safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our Connecticut heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve an ecological balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources; and (7) practice conservation in the use of energy, maximize the use of energy efficient systems and minimize the environmental impact of energy production and use.

Sec. 22a-1b. Evaluation by state agencies of actions affecting the environment. Public scoping process. Environmental monitor. The General Assembly directs that, to the fullest extent possible:

(a) Each state department, institution or agency shall review its policies and practices to insure that they are consistent with the state's environmental policy as set forth in sections 22a-1 and 22a-1a.

(b)(1) Each sponsoring agency shall, prior to a decision to draft an environmental impact evaluation pursuant to subsection (c) of this section for an action which may significantly affect the environment, conduct an early public scoping process.

(2) To initiate an early public scoping process, the sponsoring agency shall provide notice on a form that has been approved by the Council on Environmental Quality, which shall include, but not be limited to, the date, time and location of any proposed public scoping meeting and the duration of the public comment period pursuant to subdivision (3) of this subsection, to the council, the Office of Policy and Management and to any other state agency whose activities may reasonably be expected to affect or be affected by the proposed action.

(3) Members of the public and any interested state agency representatives may submit comments on the nature and extent of any environmental impacts of the proposed action during the thirty days following the publication of the notice of the early public scoping process pursuant to this section.

(4) A public scoping meeting shall be held at the discretion of the sponsoring agency or if twenty-five persons or an association having not less than twenty-five persons requests such a meeting within ten days of the publication of the notice in the Environmental Monitor. A scoping meeting shall be held not less than ten days following the notice of the project in the Environmental Monitor. The public comment period shall remain open for at least five days following the meeting.

(5) A sponsoring agency shall provide the following at a public scoping meeting: (A) A description of the

proposed action; (B) a description of the purpose and need of the proposed action; (C) a list of the criteria for a site for the proposed action; (D) a list of potential sites for the proposed action; (E) the resources of any proposed site of the proposed action; (F) the environmental limitations of such sites; (G) potential alternatives to the proposed action; and (H) any of the information the sponsoring agency deems necessary.

(6) Any agency submitting comments or participating in the public scoping meeting pursuant to this section shall include, to the extent practicable, but not be limited to, information about (A) the resources of any proposed site of the proposed action, (B) any plans of the commenting agency that may affect or be affected by the proposed action, (C) any permits or approvals that may be necessary for the proposed action, and (D) any appropriate measures that would mitigate the impact of the proposed action, including, but not limited to, recommendations as to preferred sites for the proposed action or alternatives for the proposed action that have not been identified by the sponsoring agency.

(7) The sponsoring agency shall consider any comments received pursuant to this section or any information obtained during the public scoping meeting in selecting the proposed actions to be addressed in the environmental impact evaluation and shall evaluate in its environmental impact evaluation any substantive issues raised during the early public scoping process that pertain to a proposed action or site or alternative actions or sites.

(c) Each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment

shall in the case of each such proposed action make a detailed written evaluation of its environmental impact before deciding whether to undertake or approve such action. All such environmental impact evaluations shall be detailed statements setting forth the following: (1) A description of the proposed action which shall include, but not be limited to, a description of the purpose and need of the proposed action, and, in the case of a proposed facility, a description of the infrastructure needs of such facility, including, but not limited to, parking, water supply, wastewater treatment and the square footage of the facility; (2) the environmental consequences of the proposed action, including cumulative, direct and indirect effects which might result during and subsequent to the proposed action; (3) any adverse environmental effects which cannot be avoided and irreversible and irretrievable commitments of resources should the proposal be implemented; (4) alternatives to the proposed action, including the alternative of not proceeding with the proposed action and, in the case of a proposed facility, a list of all the sites controlled by or reasonably available to the sponsoring agency that would meet the stated purpose of such facility; (5) an evaluation of the proposed action's consistency and each alternative's consistency with the state plan of conservation and development, an evaluation of each alternative including, to the extent practicable, in terms of whether it avoids, minimizes or mitigates environmental impacts, and, where appropriate, detailed mitigation measures proposed to minimize environmental impacts, including, but not limited to, where appropriate, a site plan; (6) an analysis of the short term and long term economic, social and environmental costs and benefits of the proposed action; (7) the effect of the proposed action on the use and conservation of energy resources; and (8) a

description of the effects of the proposed action on sacred sites or archaeological sites of state or national importance. In the case of an action which affects existing housing, the evaluation shall also contain a detailed statement analyzing (A) housing consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action by income group as defined in section 8-37aa and by race, and (B) the consistency of the housing consequences with the long-range state housing plan adopted under section 8-37t. As used in this section, "sacred sites" and "archaeological sites" shall have the same meaning as in section 10-381.

(d)(1) The Council on Environmental Quality shall publish a document at least once a month to be called the Environmental Monitor which shall include any notices the council receives pursuant to sections 22a-1b to 22a-1i, inclusive, and shall include notice of the opportunity to petition for a public scoping meeting. Filings of such notices received by five o'clock p.m. on the first day of each month shall be published in the Environmental Monitor that is issued not later than ten days thereafter.

(2) The Council on Environmental Quality shall post the Environmental Monitor on its Internet site and distribute a subscription or a copy of the Environmental Monitor by electronic mail to any state agency, municipality or person upon request. The council shall also provide the Environmental Monitor to the clerk of each municipality for posting in its town hall.

Sec. 22a-1c. Actions which may significantly affect the environment. Definition. As used in sections 22a-1 to 22a-1i, inclusive, "actions which may significantly affect the environment" means individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air, historic structures and landmarks as defined in section 10-320c, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals. Such actions shall include but not be limited to new projects and programs of state agencies and new projects supported by state contracts and grants, but shall not include (1) emergency measures undertaken in response to an immediate threat to public health or safety; or (2) activities in which state agency participation is ministerial in nature, involving no exercise of discretion on the part of the state department, institution or agency.

Sec. 22a-1d. Review of environmental impact evaluations. Notification to municipalities and agencies. (a) Environmental impact evaluations and a summary thereof, including any negative findings shall be submitted for comment and review to the Council on Environmental Quality, the Department of Environmental Protection, the Connecticut Historical Commission, the Office of Policy and Management, the Department of Economic and Community Development in the case of a proposed action that affects existing housing, and other appropriate agencies, and to the town clerk of each municipality affected thereby, and shall be made available to the public for inspection and comment at the same time.

The sponsoring agency shall publish forthwith a notice of the availability of its environmental impact evaluation and summary in a newspaper of general circulation in the municipality at least once a week for three consecutive weeks and in the Environmental Monitor. The sponsoring agency preparing an environmental impact evaluation shall hold a public hearing on the evaluation if twenty-five persons or an association having not less than twenty-five persons requests such a hearing within ten days of the publication of the notice in the Environmental Monitor.

(b) All comments received by the sponsoring agency and the sponsoring agency's responses to such comments shall be forwarded to the Secretary of the Office of Policy and Management.

(c) All comments so forwarded to the Secretary of the Office of Policy and Management shall be available for public inspection.

Sec. 22a-1e. Review and determination by Office of Policy and Management. The Office of Policy and Management shall review all environmental impact evaluations together with the comments and responses thereon, and shall make a written determination as to whether such evaluation satisfies the requirements of this part and regulations adopted pursuant thereto, which determination shall be made public and forwarded to the agency, department or institution preparing such evaluation. Such determination may require the revision of any evaluation found to be inadequate. Any member of the Office of Policy and Management which has prepared an evaluation and submitted it for review shall not participate in the decision of the office on such evaluation. The

sponsoring agency shall take into account all public and agency comments when making its final decision on the proposed action.

Sec. 22a-1f. Exceptions. (a) Environmental impact evaluations need not be prepared for projects for which environmental statements have previously been prepared pursuant to other state or federal laws or regulations, provided all such statements shall be considered and reviewed as if they were prepared under sections 22a-1a to 22a-1f, inclusive.

(b) Environmental impact evaluations shall not be required for the Connecticut Juvenile Training School project, as defined in subsection (1) of section 4b-55, and the extension of such project otherwise known as the Connecticut River Interceptor Sewer Project, or a project, as defined in subdivision (16) of section 10a-109c, which involves the conversion of an existing structure for educational rather than office or commercial use.

(c) A constituent unit of the state system of higher education may provide for environmental impact evaluations for any priority higher education facility project, as defined in subsection (f) of section 4b-55, or for any higher education project involving an expenditure of not more than two million dollars, by (1) reviewing and filing the evaluation for such project with the Office of Policy and Management for its review pursuant to section 22a-1e, or (2) including such project in a cumulative environmental impact evaluation approved by the Office of Policy and Management.

Sec. 22a-1g. Regulations. Within six months of October 1, 1977, the Commissioner of Environmental Protection shall adopt regulations to implement the provisions of sections 22a-1a to 22a-1f, inclusive. Such regulations shall include: (1) Specific criteria for determining whether or not a proposed action may significantly affect the environment; (2) provision for enumerating actions or classes of actions which are subject to the requirements of this part; (3) guidelines for the preparation of environmental impact evaluations, including the content, scope and form of the evaluations and the environmental, social and economic factors to be considered in such evaluations; and (4) procedures for timely and thorough state agency and public review and comment on all environmental impact evaluations required by this part and for such other matters as may be needed to assure effective public participation and efficient implementations of this part.

Sec. 22a-1h. Environmental impact evaluations. Until the adoption of regulations in accordance with the provisions of section 22a-1g, each state agency, department and institution shall prepare environmental impact evaluations in accordance with sections 22a-1b, 22a-1c and 22a-1d.

Sec. 22a-1i. Environmental contamination risk assessment by Department of Public Health. (a) For the purposes of this section, the following terms shall have the following meanings unless the context clearly denotes otherwise:

(1) "Dose-response assessment" means the quantitative determination of the potency of the toxic agent under study and the incidence of biological effects and disease in humans and biological models.

(2) "Exposure assessment" means the determination of what exposures to the toxic agent under study are anticipated or experienced by the population under study.

(3) "Hazard identification" means the quantitative determination of whether the toxic agent under study can cause adverse effects in individuals or populations under study.

(4) "Risk assessment" means the use of various databases to estimate the human health effects of exposure of individuals or populations to various hazardous substances and situations. The risk assessment process includes, but is not limited to, hazard identification, dose response assessment, exposure assessment and risk characterization. Risk assessment shall not include normal day-to-day activities conducted by state agencies mandated under federal or state laws or regulations. Specifically, activities such as environmental permitting shall not be considered to constitute a risk assessment activity, unless otherwise defined as such in state or federal regulation.

(5) "Risk characterization" means the determination of the estimated population incidence of the adverse effect anticipated following exposure to the toxic agent under study.

(b) The Department of Public Health shall be the lead agency responsible for the risk assessment of human health regarding toxic substances identified in all environmental

media, including, but not limited to, food, drinking water, soil and air.

(c) Risk assessments shall be conducted or reviewed by the Department of Public Health after the need for such risk assessments has been established by the state agency responsible for regulation of the given contamination. Such decisions on the need for risk assessments shall be made in consultation with the Department of Public Health. Nothing contained in this section shall hinder or dictate the authority of any state agency to decide when a risk assessment is required.